DOCKET

No. 08-5274
Vide 08-5298

Title:	Christopher Michael Dean, Petitioner
	v.
	United States
Docketed:	July 15, 2008
Lower Ct:	United States Court of Appeals for the Eleventh Circuit
Case Nos.:	(06-14918)
Decision Date:	February 20, 2008
Rehearing Denied:	April 15, 2008

Questions Presented

Date	Proceedings and Orders
Jul 11 2008	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due August 14, 2008)
Aug 5 2008	Order extending time to file response to petition to and including September 15, 2008.
Sep 10 2008	Order further extending time to file response to petition to and including October 15, 2008.
Oct 15 2008	Brief of respondent United States in opposition filed. VIDED.
Oct 28 2008	Reply of petitioner Christopher Michael Dean filed. VIDED. (Distributed)
Oct 30 2008	DISTRIBUTED for Conference of November 14, 2008.
Nov 14 2008	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Dec 1 2008	Motion to appoint counsel filed by petitioner Christopher Michael Dean.
Dec 8 2008	SET FOR ARGUMENT ON Wednesday, March 4, 2009.
Dec 10 2008	Motion DISTRIBUTED for Conference of January 9, 2009.
Dec 19 2008	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including January 5, 2009.
Dec 30 2008	Record received from the U.S.C.A. for the 11th Circuit. (1 envelope)
Jan 5 2009	Joint appendix filed.
Jan 5 2009	Brief of petitioner Christopher Michael Dean filed.
Jan 5 2009	Motion for leave to file Volume II of the joint appendix under seal filed by petitioner Christopher Michael Dean.
Jan 8 2009	Record received from the U.S.D.C. for the Northern District of Georgia. (1 box)
Jan 12 2009	Motion to appoint counsel filed by petitioner GRANTED. Scott J. Forster, Esquire, of Calhoun, Georgia, is appointed to serve as counsel for the petitioner in this case.
Jan 12 2009	Consent to the filing of amicus curiae briefs in support of either or neither party received from counsel for the petitioner.
Jan 12 2009	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
Jan 29 2009	CIRCULATED.
Feb 4 2009	Motion DISTRIBUTED for Conference of February 20, 2009.
Feb 4 2009	Brief of respondent United States filed. (Distributed)
Feb 23 2009	Motion for leave to file Volume II of the joint appendix under seal. GRANTED.
Feb 25 2009	Reply of petitioner Christopher Michael Dean filed. (Distributed)
Mar 4 2009	Argued. For petitioner: Scott J. Forster, Calhoun, Ga. (Appointed by this Court.) For

respondent: Deanne E. Maynard, Assistant to the Solicitor General, Department of Justice, Washington, D.C.

Name	Address	Phone
Attorneys for Petitioner:		
Scott J. Forster Counsel of Record	P.O. Box 102 Calhoun, GA 30703 SCOFORS@aol.com	(706) 625-1799
Party name: Christopher Michael Dean		
Attorneys for Respondent:		
Edwin S. Kneedler	Acting Solicitor General United States Department of Justice 950 Pennsylvania Avenue, N.W. Washington, DC 20530-0001	(202) 514-2217
Party name: United States		
Deanne E. Maynard	Assistant to the Solicitor General Department of Justice Washington, DC 20530	
Party name: United States		
Other:		
David B. Salmons	Bingham McCutchen LLP 2020 K Street, N.W. Washington, DC 20006 david.salmons@bingham.com	(202) 373-6283
Party name: National Association of Criminal Defense Lawyers, et al.		

PETITION FOR WRIT OF CERTIORARI

'20

No. 08-527

IN THE

Supreme Court of the United States

CHRISTOPHER MICHAEL DEAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

JEFFREY T. GREEN
QUIN M. SORENSON
AMY L. HANKE
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

SCOTT J. FORSTER*
P.O. Box 102
Calhoun, Georgia 30703
(706) 625-1799

Counsel for Petitioner

* Counsel of Record

July 11, 2008

QUESTION PRESENTED

Whether 18 U.S.C. § 924(c)(1)(A)(iii), establishing a ten-year mandatory minimum sentence for a defendant who "discharge[s]" a firearm during a crime of violence, requires proof that the discharge was volitional, and not merely accidental, unintentional, or involuntary.

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption. The petitioner is not a corporation. The petitioner's co-defendant, Ricardo Curtis Lopez, will file a separate petition.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS	1
INTRODUCTION	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	6
I. REVIEW IS WARRANTED TO RESOLVE THE CIRCUIT SPLIT OVER WHETHER § 924(C)(1)(A)(III) INCLUDES A GENERAL INTENT REQUIREMENT	6
II. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT	10
A. The Decision Below Is Inconsistent With Precedent Applying The Presumption In Favor Of *Mens Rea*	10
B. The Decision Below Is Inconsistent With Precedent Applying The Rule Of Lenity	13
III. REVIEW IS WARRANTED BECAUSE THIS CASE PRESENTS A QUESTION OF EXCEPTIONAL IMPORTANCE	15
CONCLUSION	17
APPENDIX	1a

TABLE OF CONTENTS—continued

Page

United States v. *Christopher Michael Dean, et al.*, No. 06-14918 (11th Cir. Feb. 20, 2008)..... 1a

United States v. *Christopher Michael Dean, et al.*, No. 06-14918 (11th Cir. Feb. 20, 2008) (judgment)..... 18a

United States v. *Christopher Michael Dean*, No. 4:04-CR-00072-HLM (N.D. Ga. Sept. 5, 2006) (judgment)..... 19a

United States v. *Christopher Michael Dean, et al.*, No. 06-14918 (11th Cir. Apr. 15, 2008) (order denying rehearing)..... 27a

United States v. *Christopher Michael Dean, et al.*, No. 4:04-CR-00072-HLM (N.D. Ga. Aug. 31, 2006) (transcript of sentencing hearing).... 28a

TABLE OF AUTHORITIES

CASES	Page
Albernaz v. *United States*, 450 U.S. 333 (1981)	13
Apprendi v. *New Jersey*, 530 U.S. 466 (2000)	12
Bifulco v. *United States*, 447 U.S. 381 (1980)	13
Burgess v. *United States*, 128 S. Ct. 1572 (2008)	14
Carter v. *United States*, 530 U.S. 255 (2000)	2, 6, 11, 12
Clark v. *Martinez*, 543 U.S. 371 (2005)	14
Harris v. *United States*, 536 U.S. 545 (2002)	9, 16
Ladner v. *United States*, 358 U.S. 169 (1958)	13
Liparota v. *United States*, 471 U.S. 419 (1985)	10
Mitchell v. *United States*, 526 U.S. 314 (1999)	12
Morissette v. *United States*, 342 U.S. 246 (1952)	10
Salsburg v. *Maryland*, 346 U.S. 545 (1954)	15
Scheidler v. *Nat'l Org. for Women Inc.*, 537 U.S. 393 (2003)	14
Staples v. *United States*, 511 U.S. 600 (1994)	10, 12, 13
United States v. *Booker*, 543 U.S. 220	15
United States v. *Brown*, 449 F.3d 154 (D.C. Cir. 2006)	*passim*
United States v. *Dare*, 425 F.3d 634 (9th Cir. 2005), *cert. denied*, 548 U.S. 915 (2006)	2, 7
United States v. *Dean*, 517 F.3d 1224 (11th Cir. 2008)	3, 8, 9

TABLE OF AUTHORITIES—continued

Page

United States v. *Granderson*, 511 U.S. 39 (1994) 13
United States v. *Nava-Sotelo*, 354 F.3d 1202 (10th Cir. 2003) 3, 8, 9
United States v. *Nelson*, No. 06-1928, 2008 WL 1836732 (6th Cir. Apr. 24, 2008) 8
United States v. *Santos*, 128 S. Ct. 2020 (2008) 13
United States v. *Shabani*, 513 U.S. 10 (1994) 13
United States v. *Tunstall*, 49 F. App'x 581 (6th Cir. 2002) 8
United States v. *U.S. Gypsum Co.*, 438 U.S. 422 (1978) 10, 11
United States v. *X-Citement Video, Inc.*, 513 U.S. 64 (1994) 10

STATUTES

18 U.S.C. § 924(c)(1)(A) 2, 7
18 U.S.C. § 1951(a) 5
18 U.S.C. § 3553(a) 15

LEGISLATIVE HISTORY

S. Rep. No. 98-225 (1983) 15

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reprinted at 517 F.3d 1224 and is reproduced in the Appendix to this opinion. Pet. App. 1a. The District Court for the Northern District of Georgia did not issue a written opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on February 20, 2008. A timely petition for rehearing was denied on April 15, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Section 924(c)(1)(A) of Title 18 of the United States Code provides:

> Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime –
>
> (i) be sentenced to a term of imprisonment of

not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 924(c)(1)(A).

INTRODUCTION

Section 924(c)(1)(A)(iii) of the United States Criminal Code states that a defendant who "discharge[s]" a firearm during a crime of violence is subject to a ten-year mandatory minimum term of imprisonment. 18 U.S.C. § 924(c)(1)(A)(iii). Implicit in this provision is a requirement that the discharge be intentional, not merely the result of mistake or accident. This interpretation is mandated by the purpose and structure of the statute and by prior decisions of this Court holding that, even in the absence of statutory language defining the necessary level of intent, it is presumed that a criminal statute requires proof that the defendant acted volitionally. See, *e.g.*, *Carter* v. *United States*, 530 U.S. 255, 269-70 (2000).

Despite this authority, the proper interpretation of § 924(c)(1)(A)(iii) has divided the circuits. Two circuits hold, in accordance with the plain meaning of the statute and the presumption of scienter, that § 924(c)(1)(A)(iii) requires proof that the defendant discharged the firearm intentionally, not merely by mistake or accident. *United States* v. *Brown*, 449 F.3d 154, 158 (D.C. Cir. 2006); *United States* v. *Dare*,

425 F.3d 634, 641 n.3 (9th Cir. 2005), *cert. denied*, 548 U.S. 915 (2006). Two other circuits hold to the contrary that a defendant may be found to have violated § 924(c)(1)(A)(iii) – and subject to the ten-year mandatory minimum sentence – even if the discharge was purely accidental and unintentional. *United States* v. *Dean*, 517 F.3d 1224, 1230 (11th Cir. 2008); *United States* v. *Nava-Sotelo*, 354 F.3d 1202, 1206-07 (10th Cir. 2003).

This case squarely presents the issue. Petitioner Christopher Michael Dean was sentenced to the mandatory minimum ten-year term of imprisonment under § 924(c)(1)(A)(iii) based on evidence that, during the bank robbery of which he was convicted, a firearm was discharged. There is no dispute that the discharge was accidental, and the lower courts accepted this fact as true in addressing Mr. Dean's sentence. Nevertheless, both the district court and the Eleventh Circuit held that proof of an intentional discharge was unnecessary and that the accidental discharge triggered the mandatory ten-year minimum sentence of § 924(c)(1)(A)(iii).

The divide among the courts of appeals means that similarly situated defendants convicted of the same crime will be subject to significantly different sentences merely because they were prosecuted in different jurisdictions. To remedy this situation, and address the clear circuit split on this issue, the petition should be granted.

STATEMENT OF THE CASE

A masked man entered a bank in Rome, Georgia during the late morning of November 10, 2004. Brandishing a small pistol, he told everyone to get on

the floor. Pet. App. 3a. He did not threaten anyone individually, or cause physical harm to any person. He simply walked behind the teller counter and started collecting money from the stations, picking up bills with his left hand and holding the pistol with his right. *Id.*

It was then that the accident occurred. As the perpetrator attempted to switch the gun from one hand to the other, it inadvertently discharged. The bullet went through a partition, ricocheted off a computer, and landed on the teller counter. The perpetrator was visibly shocked, as bank employees later testified. See Trial Tr., vol. 1, at 13, 36-37, 44-45, 107. He uttered an expletive and immediately left the bank, taking approximately $3,642.00. None of the persons inside the bank were harmed. *Id.*; see Pet. App. 3a-4a.

Local police soon arrested two suspects in the robbery: Christopher Michael Dean and Ricardo Curtis Lopez. These men were brothers-in-law, and they lived in the same apartment, along with Mr. Lopez's wife (Mr. Dean's sister). Both of them roughly matched the description of the perpetrator, and both were apprehended at or near the car used during the robbery. See Pet. App. 3a.

The investigation then took an odd turn: both men confessed to the crime and exonerated the other. At first, Mr. Lopez said that he had committed the robbery, and that Mr. Dean had not been involved. Later, however, Mr. Dean admitted that he had committed the theft, without the knowledge of Mr. Lopez. Trial Tr., vol. 3, at 31, 98. He explained that Mr. Lopez was trying to take the blame for the crime in order to protect Mr. Dean and his family from the stress of a lengthy period of incarceration. Mr. Dean said that he was coming forward now because he

"couldn't have [Mr. Lopez] going to prison for 10 years for something that [Mr. Lopez] was not guilty of." *Id.* Mr. Lopez subsequently acknowledged that Mr. Dean had in fact committed the offense. *Id.*

Notwithstanding these confessions, prosecutors charged both Mr. Dean and Mr. Lopez with conspiracy to commit bank robbery, in violation of the Hobbs Act, 18 U.S.C. § 1951(a), and aiding and abetting another in carrying, possessing, or discharging a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(iii). Following a jury trial, both defendants were convicted on both counts. Pet. App. 4a-5a.

The presentence report recommended that the defendants were subject to the mandatory ten-year minimum term of imprisonment under § 924(c)(1)(A)(iii). Citing *United States* v. *Brown*, 449 F.3d 154 (D.C. Cir. 2006), the defendants objected on the ground that the discharge of the firearm had been accidental. See Pet. App. 41a. The district court did not disagree with the defendants' characterization of the record, but held that § 924(c)(1)(A)(iii) applied even when the discharge was unintentional. It therefore sentenced each of the defendants to the mandatory minimum term of imprisonment of 120 months, under § 924(c)(1)(A)(iii).[1] *Id.* at 51a-52a, 60a, 69a.

The Eleventh Circuit affirmed. It acknowledged that "[t]estimony at trial supports [the] assertion that the discharge of the firearm . . . was likely accidental" – a finding the government did not dispute. *Id.* at 9a.

---

[1] Mr. Dean was also sentenced to a 100-month term of imprisonment, to run consecutive to the ten-year term imposed under § 924(c)(1)(A)(iii), for his conviction under the Hobbs Act of conspiracy to commit bank robbery. Pet. App. 4a-5a.

Nonetheless, it held that, because "§ 924(c)(1)(A)(iii) does not contain a separate intent requirement," the "mere discharge of [a firearm] is controlling" and mandates application of the ten-year mandatory minimum sentence. *Id.* at 2a-3a.

REASONS FOR GRANTING THE PETITION

This case presents a discrete and significant issue: whether 18 U.S.C. § 924(c)(1)(A)(iii) should be interpreted to include a general intent element. This Court has held in several cases, including *Carter* v. *United States*, 530 U.S. 255 (2000), that in the absence of contrary statutory language a criminal statute is presumed to require proof that the criminal act was committed volitionally, not merely by mistake or accident. *Id.* at 267-70. Nevertheless, the circuit courts are divided over whether § 924(c)(1)(A)(iii) may be violated by purely accidental conduct. This conflict has resulted in similarly situated defendants convicted of the same offense receiving substantially different sentences, based solely on the jurisdiction in which they happen to be prosecuted. The petition should be granted to address this conflict and resolve this discrepancy.

I. REVIEW IS WARRANTED TO RESOLVE THE CIRCUIT SPLIT OVER WHETHER § 924(C)(1)(A)(III) INCLUDES A GENERAL INTENT REQUIREMENT.

The federal courts of appeals are squarely divided over whether proof of intent is required to impose the ten-year mandatory minimum sentence under § 924(c)(1)(A)(iii). Such fundamental disagreement on the requirements for imposing a lengthy,

mandated term of imprisonment compels this Court's review.

1. Two courts of appeals, the District of Columbia Circuit and the Ninth Circuit, hold that proof of general intent is required under § 924(c)(1)(A)(iii). *Brown*, 449 F.3d at 158; *Dare*, 425 F.3d at 641 n.3. This holding finds support in the language and structure of the statute. *Brown*, 449 F.3d at 156-57. The three subsections of § 924(c)(1)(A) set forth a "progression" of increasingly severe penalties for different criminal acts: a mandatory five-year term of imprisonment for "us[ing]" a firearm during a crime of violence, 18 U.S.C. § 924(c)(1)(A)(i), a seven-year term if the firearm is "brandished," *id.* § 924(c)(1)(A)(ii), and a ten-year term if the firearm is "discharged," *id.* § 924(c)(1)(A)(iii). *Brown*, 449 F.3d at 156-57. There is no dispute that the first two subsections of the statute, the "use" and "brandish" provisions, require proof that the defendant committed the act intentionally, not merely by mistake or accident. *Id.* It follows that the third subsection, which is phrased in the same manner, should likewise be interpreted to include a scienter requirement. *Id.*

This reading accords with the purpose of the statute. The reason why the third subsection of § 924(c)(1)(A) prescribes an additional three-year term of imprisonment for an individual who "discharge[s]" a firearm during a crime of violence is because that individual is more morally culpable that one who merely "use[s]" or "brandishe[s]" a firearm. *Id.* However, when the discharge is involuntary or merely accidental, the rationale for a higher sentence disappears, since an individual cannot be deemed morally responsible for an unintentional act. *Id.* In other words, "as between an intentional brandishing

and a purely accidental discharge, the increment in risk, given the less reprehensible intent, seems inadequate to explain a congressional intent to add three years." *Id.* at 157.

This interpretation is further bolstered by the presumption of *mens rea* and the rule of lenity. *Id.* at 156-57. "[L]aws that deprive an individual of his liberty should be strictly construed" and are presumed to require proof of intent. *Id.* at 157 (quoting *United States* v. *Burke*, 888 F.2d 862, 866 n.6 (D.C. Cir. 1989)). Under these doctrines, § 924(c)(1)(A) must be interpreted to require proof that the discharge was intentional, not merely accidental. *Id.*

2. In direct conflict with the interpretation followed by the District of Columbia and Ninth Circuits, the Tenth and Eleventh Circuits hold that proof of intent is not required under § 924(c)(1)(A)(iii). *Dean*, 517 F.3d at 1230; *Nava-Sotelo*, 354 F.3d at 1206-07. In these jurisdictions, "the mere fact that the weapon discharged is controlling," requiring imposition of the ten-year mandatory minimum sentence. *Nava-Sotelo*, 354 F.3d at 1206-07.[2]

These courts acknowledge the presumption favoring *mens rea* in criminal statutes, but they hold that this presumption simply does not apply to

---

[2] The Sixth Circuit has held in an unpublished opinion that § 924(c)(1)(A)(iii) "does not expressly require a specific intent to discharge the weapon." *United States* v. *Tunstall*, 49 F. App'x 581, 582 (6th Cir. 2002). However, in a more recent unpublished opinion, the same court said that "[t]he *mens rea* issue is one on which the Sixth Circuit has not taken a position." *United States* v. *Nelson*, No. 06-1928, 2008 WL 1836732, at *2 (6th Cir. Apr. 24, 2008) (per curiam).

"sentencing enhancements," such as § 924(c)(1)(A)(iii). *E.g.*, *id.* In support of this conclusion, they rely on *Harris* v. *United States*, 536 U.S. 545 (2002). While *Harris* did define § 924(c)(1)(A)(iii) as a sentencing "enhancement," it did not address the presumption of *mens rea* or suggest that the presumption was inapplicable to that subsection, or to sentencing enhancements generally. See *id.* at 555-57.

The Tenth and Eleventh Circuits reject the conclusion that Congress intended for increasingly severe penalties to be meted out only for increasingly culpable conduct. *E.g.*, *Dean*, 517 F.3d at 1230. They conclude that "discharging a firearm, regardless of intent, presents a greater risk of harm than simply brandishing a weapon without discharging it," justifying a higher sentence. *Id.* They also find that the rationale for requiring intent – "to avoid criminalizing apparently innocent conduct" – is absent with respect to sentencing factors because the individual has demonstrated a "vicious will" by committing the underlying offense. *Id.* (citing *Nava-Sotelo*, 354 F.3d at 1207).

3. The circuit conflict is thus entrenched and deep. The courts of appeals disagree over both the plain meaning of § 924(c)(1)(A)(iii) and the purpose of that provision. They further disagree over the fundamental question of whether the presumption in favor of scienter in criminal statutes can *ever* apply to sentencing enhancements. This Court's review is necessary to bring predictability and consistency to this area of criminal law.

II. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT.

Decisions of this Court make clear that, absent evidence of a contrary congressional intent, criminal statutes should be read to require proof that the defendant engaged in the conduct at issue intentionally, not merely by accident or mistake. *E.g.*, *United States* v. *U.S. Gypsum Co.*, 438 U.S. 422, 436 (1978). This principle flows from two related doctrines: the presumption in favor of *mens rea* and the rule of lenity. See *id.* at 436-37. The decision of the Eleventh Circuit contravenes both of these doctrines and conflicts with this Court's precedent, warranting review.

A. The Decision Below Is Inconsistent With Precedent Applying The Presumption In Favor Of *Mens Rea*.

This Court has held in numerous cases that "existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Id.* at 436 (quoting *Dennis* v. *United States*, 341 U.S. 494, 500 (1951)); see *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 68-69 (1994); *Staples* v. *United States*, 511 U.S. 600, 605-06 (1994); *Liparota* v. *United States*, 471 U.S. 419, 426 (1985); *Morissette* v. *United States*, 342 U.S. 246, 273-75 (1952). A criminal statute will be read to require proof of at least general intent – *i.e.*, proof that the criminal act was committed volitionally and not merely by accident or mistake – "absent a clear statement from Congress that *mens rea* is not required." *Staples*, 511 U.S. at 605-06, 618. "[F]ar more than the simple omission of the appropriate phrase from the statutory definition is necessary to

justify dispensing with an intent requirement." *Gypsum*, 438 U.S. at 438.

The presumption of *mens rea* was addressed most recently in *Carter*. The Court held that 18 U.S.C. § 2113(a), which criminalizes the taking of property from a bank by force or intimidation, is satisfied by proof that the defendant engaged in the proscribed conduct intentionally, without regard to whether the defendant acted with an actual felonious purpose. 530 U.S. at 268-70. It distinguished between two levels of intent: (i) "specific intent," meaning the defendant engaged in criminal conduct with the actual purpose of violating criminal law, and (ii) "general intent," meaning the defendant engaged in criminal conduct volitionally – not by mere accident or mistake – but not necessarily with the specific purpose of violating the law. *Id.* Although criminal statutes are always presumed to require proof of "general intent" (absent contrary statutory language), they will be presumed to incorporate a "specific intent" element only when necessary "to separate wrongful from 'otherwise innocent' conduct." *Id.*

The Court concluded that, because the intentional taking of bank property by force is wrongful in and of itself, there was no need to engraft onto the statute a "specific intent" element. *Id.* Proof of general intent, mandated by the presumption of *mens rea*, satisfied the purpose of the statute. *Id.*

The reasoning in *Carter* (not cited by the Eleventh Circuit) controls this case, and compels an outcome contrary to that of the Eleventh Circuit. The presumption of *mens rea* dictates that a criminal statute should be read to include at least a general intent element: at the very minimum, the defendant must act volitionally, and not merely by mistake or

accident.[3] See *id.* In other words, under *Carter* and other opinions addressing the presumption of *mens rea*, even if § 924(c)(1)(A)(iii) does not require proof of *specific* intent, it at least demands proof of *general* intent.

None of this Court's decisions has adopted the Eleventh Circuit's view that the presumption of *mens rea* applies only to offense "elements" and not to "sentencing enhancements." To the contrary, the Court's opinions have contemplated universal application of the presumption, holding that it will compel a *mens rea* requirement (of at least general intent) in all cases except those few in which Congress plainly intended to create a strict liability crime (as in the case of certain "public welfare" offenses, see *supra* note 3). See, *e.g.*, *Carter*, 530 U.S. at 268-70; see also *Apprendi* v. *New Jersey*, 530 U.S. 466, 494 (2000) (rejecting distinction between "elements" and "sentencing factors" in Fifth Amendment analysis); *Mitchell* v. *United States*, 526 U.S. 314, 327 (1999) (the Fifth Amendment applies equally to issues concerning "the severity of... punishment" as to those concerning "guilt or innocence"). The contrary judgment of the Eleventh Circuit in this case conflicts with this Court's precedent, calling for further review.

---

[3] The presumption of scienter does not require proof of intent, specific or general, in a small category of "public welfare" crimes. *Staples*, 511 U.S. at 617-18. These offenses are limited to those for which "penalties ... are relatively small, and conviction does no grave damage to an offender's reputation." *Id.* (quoting *Morissette*, 342 U.S. at 256). Neither the government nor any of the courts addressing § 924(c)(1)(A)(iii) has suggested that this provision – with its ten-year mandatory minimum term of imprisonment – is merely a "public welfare" offense.

B. The Decision Below Is Inconsistent With Precedent Applying The Rule Of Lenity.

The decision below also conflicts with the rule of lenity, as adopted by this Court in several cases. "[T]he touchstone of the rule of lenity is statutory ambiguity." *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980) (internal quotation marks omitted). It "applies only when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute." *United States* v. *Shabani*, 513 U.S. 10, 17 (1994). The rule requires that "ambiguous criminal statute[s] be construed in favor of the accused." *Staples*, 511 U.S. at 619 n.17; *United States* v. *Granderson*, 511 U.S. 39, 54 (1994) ("[W]here text, structure, and history fail to establish that the Government's position is unambiguously correct – we apply the rule of lenity and resolve the ambiguity in the defendant's favor."). In short, "[u]nder a long line of [this Court's] decisions, the tie must go to the defendant." *United States* v. *Santos*, 128 S. Ct. 2020, 2025 (2008) (plurality opinion).

Importantly, the Court has recognized that this rule "applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose." *Albernaz* v. *United States*, 450 U.S. 333, 342 (1981). "This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Ladner* v. *United States*, 358 U.S. 169, 178 (1958); see also *Santos*, 128 S. Ct. at 2025 ("This venerable rule . . . vindicates the fundamental principle that no citizen should be . . . subjected to punishment that is not clearly prescribed.").

At a minimum, § 924(c)(1)(A)(iii) is ambiguous as to the intent requirement. Unlike the definitions of the relevant terms in *Burgess* v. *United States*, 128 S. Ct. 1572 (2008), Congress clearly has not defined the intent requirement contained in the discharge provision of § 924(c)(1)(A) in a "coherent, complete, and . . . exclusive" manner. See *id.* at 1580. To the contrary, the statute is silent as to the intent requirement. Indeed, the very existence of a circuit split on this question of law indicates the statutory ambiguity. Obviously, reasonable minds differ as to what Congress intended in § 924(c)(1)(A)(iii).[4]

Absent clear evidence that Congress intended to abrogate the common law requirement of *mens rea*, and impose a more severe penalty without increased culpability, the rule of lenity requires that any ambiguity in § 924(c)(1)(A)(iii) be resolved in favor of the accused. The Eleventh Circuit's decision to the contrary conflicts with this Court's precedent and warrants review.

---

[4] Additionally, if a court is unsure if statutory ambiguity exists, then this uncertainty should be resolved in favor of finding ambiguity. *Scheidler* v. *Nat'l Org. for Women Inc.*, 537 U.S. 393, 408 (2003) ("[T]his being a criminal statute, it must be strictly construed, and any ambiguity must be resolved in favor of lenity.") (internal quotation marks omitted); *see also Clark* v. *Martinez*, 543 U.S. 371, 380-81 (2005) ("[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail – whether or not those constitutional problems pertain to the particular litigant before the Court.").

III. REVIEW IS WARRANTED BECAUSE THIS CASE PRESENTS A QUESTION OF EXCEPTIONAL IMPORTANCE.

The inevitable result of the split among the circuits on the interpretation of § 924(c)(1)(A)(iii) is serious disparity in the sentences of similarly situated defendants. A defendant sentenced in the District of Columbia Circuit will be subject to a seven-year mandatory minimum term of imprisonment, while a defendant sentenced in the Eleventh Circuit *for the same conduct* will be subject to a ten-year term. This result is not only contrary to congressional intent, see S. Rep. No. 98-225, at 65 (1983) (noting that the purpose of the Sentencing Reform Act was to eliminate "shameful disparity in criminal sentences" among jurisdictions); see also 18 U.S.C. § 3553(a)(6) (requiring consideration of "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct"); *United States* v. *Booker*, 543 U.S. 220, 252-54 (same), but is also fundamentally unfair and implicates constitutional due process and equal protection concerns, see *Salsburg* v. *Maryland*, 346 U.S. 545, 550-53 (1954) (noting that territorial discrepancies in criminal procedure may raise such concerns).

The disparity is evident in this case. Mr. Dean was convicted of participating in a bank robbery in which a firearm was accidentally discharged. As a result, he was sentenced to a mandatory minimum ten-year term of imprisonment under § 924(c)(1)(A)(ii). A similarly situated defendant in *Brown* was likewise convicted of participating in a bank robbery in which a firearm was discharged accidentally. 449 F.3d at 155. Yet, the defendant in *Brown* was subject to only

a seven-year mandatory term of imprisonment under § 924(c)(1)(A)(ii). *Id.*

The sole reason for the difference in the sentences imposed in this case and in *Brown* is the differing interpretations of § 924(c)(1)(A)(iii) adopted by the District of Columbia and Eleventh Circuits. In short, Mr. Dean is facing three more years in prison based on nothing more than the happenstance of where the crime was committed.

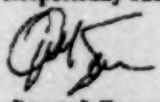
Defendants subject to § 924(c)(1)(A) almost invariably receive the applicable mandatory minimum sentence. *Harris*, 536 U.S. at 578 (Thomas, J., dissenting) ("almost all persons sentenced for violations of 18 U.S.C. § 924(c)(1)(A) are sentenced to 5, 7, or 10 years' imprisonment"). In most instances, therefore, the mandatory minimum functions effectively as the final sentence. *Id.* The conflict among the circuits concerning the interpretation of § 924(c)(1)(A) thus has the direct effect of producing sentencing disparities among similarly situated defendants.

This result is contrary to the purpose of the Sentencing Reform Act and to the notion of a fair and uniform national sentencing system. Review by this Court is necessary to address these fundamental discrepancies and to ensure that the constitutional rights of defendants are preserved.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,



JEFFREY T. GREEN
QUIN M. SORENSON
AMY L. HANKE
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

SCOTT J. FORSTER*
P.O. Box 102
Calhoun, Georgia 30703
(706) 625-1799

Counsel for Petitioner

July 11, 2008

* Counsel of Record

RULE 33.1(h) CERTIFICATE OF COMPLIANCE

No. 08-

Christopher Michael Dean,

Petitioner,

v.

United States of America,

Respondent.

As required by Supreme Court Rule 33.1(h) I, Quin M. Sorenson, certify that the Petition for a Writ of Certiorari in the foregoing case contains 4,119 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 11, 2008.

Quin M. Sorenson
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

CERTIFICATE OF SERVICE

No. 08-

Christopher Michael Dean,

Petitioner,

v.

United States of America,

Respondent.

I, Quin M. Sorenson, do hereby certify that, on this 11th day of July, 2008, I caused three copies of the Petition for a Writ of Certiorari in the foregoing case to be served by first class mail, postage prepaid on the following party:

William Gavin Traynor
Amy Levin Weil
U.S. Attorney's Office,
Northern District of Georgia
75 Spring Street SW
Suite 600
Atlanta, GA 30303-3309
william.traylor@usdoj.gov

Gregory G. Garre
Acting Solicitor General
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Quin M. Sorenson
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

PETITION APPENDIX

BEST AVAILABLE COPY

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 06-14918

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FEBRUARY 20, 2008
THOMAS K. KAHN
CLERK

D.C. Docket No. 04-00072-CR-HLM-4

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHRISTOPHER MICHAEL DEAN,
RICARDO CURTIS LOPEZ,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Georgia

(February 20, 2008)

Before HULL and PRYOR, Circuit Judges, and MOORE,* District Judge.

*Honorable K. Michael Moore, United States District Judge for the Southern District of Florida, sitting by designation.

MOORE, District Judge:

There are two main issues involved in this appeal. First, this Court reviews whether there was sufficient evidence to convict codefendants Christopher Michael Dean and Ricardo Curtis Lopez ("Appellants") for conspiracy to interfere with interstate commerce by robbery in violation of the Hobbs Act, 18 U.S.C. § 1951(a). Second, this Court also examines whether 18 U.S.C. § 924(c)(1)(A)(iii), a sentencing enhancement for discharge of a firearm, includes an intent element. Lopez also raises separate issues involving a claimed erroneous jury instruction and the consolidation of his juvenile offenses.

Appellants claim insufficient evidence was presented as to the victim bank's Federal Deposit Insurance Corporation insured status. However, 18 U.S.C. § 1951(a), unlike 18 U.S.C. § 2113, requires no such proof. Consequently, the government needed to prove only that Dean and Lopez committed a robbery that had an effect on interstate commerce. The government met this burden through the testimony of an AmSouth Bank branch manager; consequently, we deny Dean and Lopez's § 1951(a) insufficient evidence argument.

Further, given that § 924(c) is a sentencing enhancement, not an element of an offense, this Court holds that § 924(c)(1)(A)(iii) does not contain a separate intent requirement. The mere discharge of a firearm during any crime of violence or drug trafficking, even accidental, is subject to the sentencing enhancement

requiring a minimum of ten additional years of imprisonment. Therefore, Appellants' discharge of firearm argument is likewise denied.

I.BACKGROUND

Dean and Lopez were brothers-in-law who cohabitated at the Hidden Glen complex, which is located in or around Rome, Georgia. According to the testimony of Jimmy Tanner, the former manager of AmSouth Bank's Rome, Georgia branch, on November 10, 2004, a masked man entered the bank around 10:00 a.m. The individual, later identified as Christopher Michael Dean, through his own confession, carried a pistol and yelled at everyone to get on the ground. Dean approached the teller stations, opened the security gate, and gained access to the teller area. Once inside the teller area, Dean removed bills of currency from the drive-through teller drawer with his left hand, while holding the pistol with his right hand. Next, Dean approached the head teller station. The head teller was on her knees below the station. Dean reached over the crouched teller and with his left hand started taking money from the teller drawer. As he was grabbing the money, Dean discharged the gun in his right hand, leaving a bullet hole in the partition between the two teller work stations. Upon discharge, Dean cursed himself as if the shot was inadvertent. Immediately after the shot, Dean grabbed as much money as he could from the head teller drawer and ran out of the bank.

Manager Tanner observed Dean exit the bank and enter a silver Ford Taurus without licence plates. In all, Dean stole $3,642.00.

Through further trial testimony, it was established that AmSouth Bank is headquartered outside of Georgia in Birmingham, Alabama. After the robbery, the Rome, Georgia branch remained closed for the remainder of the day. Also during the course of Tanner's trial testimony, the government moved for admission of AmSouth's FDIC certification, which revealed that AmSouth operated in numerous states and was FDIC insured. Defense counsel objected and argued that the certificate was testimonial and not self-authenticating. The document was admitted over objection.

After their arrest, both Lopez and Dean, at different times, claimed responsibility for the robbery. The government maintained that the evidence supported finding that Dean and Lopez conspired to rob AmSouth based upon (1) their cohabitation; (2) joint drug debt; (3) Lopez's knowledge of the robbery's factual details; (4) and Lopez's possession of the firearm used in the bank robbery. Ultimately, the jury found both Dean and Lopez guilty of conspiring to interfere with interstate commerce by robbery, in violation of the Hobbs Act, 18 U.S.C. § 1951(a) (count one); and aiding and abetting each other in the discharge of a pistol during an armed robbery, in violation of 18 U.S.C. § 924(c)(1)(A)(iii) and 18 U.S.C. § 2 (count two). The district court sentenced Dean to 100 months as to

count one and 120 months as to count two, consecutive to count one, whereas Lopez was sentenced to 78 months on count one and 120 months as to count two, consecutive to count one

II.STANDARDS OF REVIEW

This Court reviews the first issue, sufficiency of the evidence for Appellants' Hobbs Act violations, under a de novo standard of review. See United States v. Yates, 438 F.3d 1307, 1311 (11th Cir. 2006). The Court also employs a de novo standard of review in analyzing the district court's legal conclusion that 18 U.S.C. § 924(c)(1)(A)(iii) did not contain a separate mens rea requirement. King v. Moore, 312 F.3d 1365, 1366 (11th Cir. 2002).

III.DISCUSSION

Appellants each contend that the government failed to prove that AmSouth's deposits were insured by the FDIC, which they maintain requires this Court to vacate their convictions. In support of their argument, Appellants claim that exhibit 6, which is the FDIC certification and affidavit of the Assistant Secretary of the FDIC, was testimonial evidence admitted in violation of the Confrontation Clause as set forth in Crawford v. Washington, 541 U.S. 36 (2004).

To obtain a conviction for conspiring to interfere with interstate commerce through robbery, in violation of the Hobbs Act, 18 U.S.C. § 1951(a), the

government need only prove a robbery and effect on commerce. United States v. Rodriguez, 218 F.3d 1243, 1244 (11th Cir. 2000) (holding "[t]wo elements are essential for a Hobbs Act Prosecution: robbery and an effect on commerce"). At trial, Dean admitted to committing the robbery; thus, the only remaining issue is whether the government sufficiently proved that the robbery affected commerce. Appellants argue that the government did not meet its burden in proving an effect on commerce because the FDIC certificate and supporting affidavit were improperly admitted.

Before turning to the issue of its admissibility, we address whether the FDIC certificate was even necessary to prove a Hobbs Act violation. As discussed supra, a Hobbs Act violation requires proof of a robbery and an effect on commerce. Id. To prove an effect on commerce, however, the government is only required to establish "a minimal effect on interstate commerce." Id. This Court has held that a "mere depletion of assets" is sufficient proof of an effect on interstate commerce. Id.

AmSouth Branch Manager Tanner testified that AmSouth's headquarters were located outside the state of Georgia in Birmingham, Alabama. Tanner also stated the Rome, Georgia branch remained closed following Dean's 10:00 a.m. robbery of $3,642.00. The robbery forced the Rome branch to close and prevented any additional patrons from transacting business for the remainder of the day.

This case is similar to United States v. Guerra, where an individual stole $300 dollars from a service station, which was subsequently forced to close for two hours. There, this Court found an effect on interstate commerce and labeled the case a "classic 'depletion of assets' scenario." 164 F.3d 1358, 1361 (11th Cir. 1999). In Rodriguez, this Court found an effect on commerce where the perpetrator had robbed a motel because some of the motel guests were from out of state. 218 F. 3d at 1244. Given our Hobbs Act sufficiency of evidence jurisprudence, the government's evidence, which included the stealing of $3,642.00 from a bank with interstate branches and that is open to out of state customers, was sufficient to establish an effect on commerce. Further, the stealing of the money depleted AmSouth's cash reserve and thereby affected commerce. This evidence was sufficient to sustain Appellants' convictions for violation of 18 U.S.C. § 1951(a).

Appellants argue that the FDIC certificate and accompanying affidavit were improperly admitted in violation of the Confrontation Clause. Proof of a Hobbs Act violation does not require proof of FDIC insurance. FDIC insured status is an element of armed bank robbery under 18 U.S.C. § 2113, but not of 18 U.S.C. § 1951(a). See Poole v. United States, 832 F.2d 561, 564-65 (11th Cir. 1987). Appellants claim that United States v. Sandles requires reversal based upon the government's alleged erroneous use of the FDIC certificate and accompanying

affidavit. 469 F.3d 508 (6th Cir. 2006). The situation in Sandles is inapposite because there the defendant was charged with armed bank robbery, which, as stated above, requires proof of FDIC insurance. Therefore, it is not necessary for this Court to address Appellants' Confrontation Clause claim surrounding admission of the FDIC certificate and affidavit. Even if the FDIC certificate and affidavit were admitted in error, the error was harmless, as no proof of FDIC insured status was needed and the government provided separate evidence establishing the Hobbs Act violation. See United States v. Ndiaye, 434 F.3d 1270, 1286 (11th Cir. 2006) (stating "denial of a defendant's Confrontation Clause right to cross-examination is examined for harmless error").

Furthermore, Appellant Lopez argues that proof of FDIC insured status was necessary for the government to meet its burden with respect to the Hobbs Act's effect on commerce prong. A bank's FDIC status could be relevant to the effect on commerce inquiry, see United States v. Spinello, 265 F.3d 150, 156-57 (3d Cir. 2001) (bank robbery case), but it is not required here. As discussed above, a mere depletion of assets is sufficient to prove an effect on commerce. Here, the depletion was proven; consequently, proof of FDIC insured status was not necessary because the trial testimony established depletion of assets, bank closure, and out of state branches, which proved the requisite effect on commerce.

Appellants next claim that 18 U.S.C. § 924(c)(1)(A)(iii) requires that the

sentencing enhancement for discharge of a firearm applies only to intentional firearm discharges. Testimony at trial supports Dean's assertion that the discharge of the firearm inside the bank was a surprise even to Dean and, thus, was likely accidental. Our Court has not squarely addressed in any published opinion whether a firearm discharge must be intended before the sentencing enhancement is applicable. We now hold that nothing in the language of the statute requires separate proof of intent before applying the sentencing enhancement.

Section 924(c)(1)(A)(iii) is a sentence enhancement and merely reflects factors that will enhance sentencing, not elements of an offense. Harris v. United States, 536 U.S. 545, 556 (2002). Section 924(c)(1)(A)(iii) states in pertinent part, "any person who . . . uses or carries a firearm . . . shall, in addition to the punishment provided for such crime of violence or drug trafficking crime[,]– (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years." The plain language of § 924(c)(1)(A)(iii) requires only a person to "use[] or carr[y] a firearm" to be subject to the sentence enhancement; there is no reference to any mens rea requirement. Looking to our case law, we analyzed a similar mens rea sentencing enhancement claim in United States v. Brantley, 68 F.3d 1283, 1290 (11th Cir. 1995).

Brantley involved possession of a semi-automatic firearm that, unbeknownst to its carrier, had been illegally altered into a fully automatic

weapon. Id. at 1289. This Court held that the carrier had to have known of the firearm's altered status to be found guilty of carrying an illegal firearm under 26 U.S.C. § 5861(d). Id. at 1290. We, however, found that the defendant's conviction under § 924(c) did not require any separate intent. Id. This Court differentiated the intent requirements of § 5861 and § 924(c) because it was concerned that removing the mens rea requirement from § 5861 could punish an innocent individual who did not realize the firearm was prohibited. We did not have the same fear of punishing an unknowing individual under § 924(c) because imposition of that sentence enhancement first demands the government prove the defendant engaged in an underlying violent or drug trafficking crime, which will have its own mens rea requirement. Id. at 1289-90 (stating "unlike the law abiding individual who unknowingly comes into possession of an illegal firearm, the §924(c) defendant whose sentence is enhanced based upon the type of weapon he carried has demonstrated a 'vicious will' by committing the principal offense").

In addition to our Brantley decision, this Court is also persuaded by the Tenth Circuit's reasoning in United States v. Nava-Sotelo, 354 F.3d 1202 (10th Cir. 2003). In that case, the brother of an inmate attempted to rescue the inmate on his way back from receiving dental treatment outside of the prison. Id. at 1203. In a struggle between the defendant and one of the prison transporting officers, the prison officer grabbed the defendant's gun and as the two were fighting over it, the

defendant accidentally discharged the weapon into the ground. Id. The Tenth Circuit supported its finding that § 924(c)(1)(A)(iii) did not have an additional mens rea requirement by finding the plain language of the statute did not include any requirement of intent. Id. at 1207. Further, the Tenth Circuit stated § 924(c)(1)(A)(iii) lists sentencing enhancements, not elements of an offense, and when the underlying offense requires a vicious will the danger of imposing punishment upon an innocent party is absent. Id. Given this reasoning, the Nava-Sotelo Court succinctly concluded "[a]ccountability is strict; the mere fact that the weapon discharged is controlling." Id. at 1206.

Appellants urge this Court to adopt the D.C. Circuit's reasoning in United States v. Brown, 449 F.3d 154 (D.C. Cir. 2006), which found § 924(c)(1)(A)(iii) did require intent to discharge in order for a defendant to receive the ten year sentencing enhancement. The D.C. Circuit found that the three subsections of § 924(c) worked in concert to impose increasingly heavier penalties as the defendant's conduct became more egregious. Id. at 156. The D.C. Circuit, therefore, reasoned that § 924(c)(1)(A)(iii) [discharge] must contain an intent requirement because it contains a harsher penalty than § 924(c)(1)(A)(ii) [brandishing]. Id. This reasoning is not persuasive because discharging a firearm, regardless of intent, presents a greater risk of harm than simply brandishing a weapon without discharging it. The penalty is an enhancement for conduct that

occurred, not intent. The D.C. Circuit also found a mens rea requirement because of the general presumption against strict liability in criminal statutes. This reason is equally unpersuasive as there is a distinction between elements of an offense and sentencing enhancements for conduct during perpetration of a violent criminal act.

Here, despite the evidence that Dean accidentally discharged his pistol during the AmSouth robbery, the district court correctly found that he remained subject to the § 924(c)(1)(A)(iii) sentencing enhancement. Consistent with our reasoning in Brantley, Appellants had the vicious will to conspire to commit the underlying crime of robbery in violation of the Hobbs Act, which ensures that they are not innocent individuals unfairly held to a strict liability offense. Finally, adopting the Tenth Circuit's reasoning, Dean's mere discharge of the pistol is controlling. Therefore, the district court did not err in holding that § 924(c)(1)(A)(iii) lacks a separate mens rea requirement.

On appeal, Lopez levied two additional arguments not raised by his codefendant. First, Lopez claims that the district court's jury instruction created an unconstitutional mandatory presumption. Second, he argues that the district court erroneously found that his prior juvenile armed robbery convictions were not functionally consolidated.

Lopez raises his objection to the district court's jury instruction for the first

time on appeal; consequently, this Court reviews the instruction for plain error. United States v. Vasquez, 53 F.3d 1216, 1221 (11th Cir. 1995). Further, we must review the challenged jury instruction in its entirety. United States v. Myers, 972 F.2d 1566, 1573 (11th Cir. 1992).

Lopez finds error with the district court's following instruction: "You may find the requisite effect upon interstate commerce has been proven if you find beyond a reasonable doubt that the bank described in the indictment was engaged in doing business both within and without the state of Georgia." Lopez contends that this jury instruction lowers the standard of proof by creating the mandatory presumption that the robbery of the Rome, Georgia branch affected interstate commerce.

A jury instruction which creates a burden shifting presumption or a conclusive presumption deprives a defendant of his right to the due process of the law. See Sandstrom v. Montana, 442 U.S. 510, 524 (1979). An instruction must not relieve the government of its burden of proving each and every element of an offense. Id. "The threshold inquiry in evaluating whether a jury instruction impermissibly shifts the burden of proof is whether the instruction is a permissive inference or a mandatory presumption." Baxter v. Thomas, 45 F.3d 1501, 1509 (11th Cir. 1995). Further, "[a] permissive presumption merely allows an inference to be drawn and is constitutional so long as the inference would not be irrational."

Id. This Court, in Myers, held a permissive inference permits the jury to make an inference from the evidence proven by the prosecution, but does not mandate any such finding. United States v. Myers, 972 F.2d 1566, 1573 (11th Cir. 1992) (stating "[t]he district court explicitly informed the jury that it 'may' infer that a person ordinarily intends all the natural and probable consequences of an act .... This circuit has approved similar jury instructions that allow the jury to infer intent from the natural and probable consequences of any act.").

In the instant case, the district court similarly instructed the jury that it "may" find an effect upon interstate commerce. Id. The court did not create a mandatory presumption through the use of unqualified language such as must or shall. The court also did not relieve the prosecution of its burden because it still required the jury to "find beyond a reasonable doubt that the bank described in the indictment was engaged in doing business both within and without the state of Georgia." The government put into evidence the testimony of Branch Manager Tanner that revealed AmSouth's out of state headquarters and its half-day closure, which provided the jury with the opportunity to reasonably infer an effect upon interstate commerce. Further, the instruction resembles the one we previously upheld in Myers. Accordingly, this Court finds that the challenged instruction created a permissive inference, did not relieve the prosecution of proving each and every element beyond a reasonable doubt, and, thus, did not constitute plain error.

Defendant Lopez pled guilty to four counts of armed robbery in the Georgia juvenile court system. Lopez committed five armed robberies over a span of four days in late July, 1997. After the final robbery, Lopez was arrested and charged separately for the four crimes.[1] Each charge of armed robbery was assigned a separate case number, but one lawyer represented Lopez in each case and a single plea agreement was reached covering all four offenses. In addition, the juvenile court imposed a single sentence for all four robberies at one proceeding. Lopez, based upon these facts, argues his underlying armed robbery adjudications were functionally consolidated and the district court should have treated them as related cases under U.S.S.G. § 4A1.2, Application Note 3(C).

In calculating Lopez's criminal history score, the probation officer assessed two criminal history points for each of the four juvenile armed robberies. These eight points, along with a single point for an adult battery conviction, gave Lopez a total criminal history score of nine, which establishes a criminal history category of IV. Based upon his criminal history category and total offense level, Lopez's guideline range, as to count one, was 77-96 months. On count one, the district court sentenced Lopez to 78 months imprisonment. At sentencing, the district court judge also stated that he still would have imposed a term of 78 months

---

[1]Two of the robberies were charged in a single petition, which made the two charges proper for consolidation as one armed robbery.

imprisonment as a reasonable sentence, regardless of any guidelines miscalculation, because of the facts of the case and defendant's misleading and shifting testimony offered in an effort to hide the truth. Lopez contends that he should have received only two points for the four armed robberies because he was sentenced only once. This one robbery charge, in addition to the adult battery charge, would have given him a criminal history score of 3, a criminal history category of II, and a guideline range of 57-71 months.

This Court need not address Lopez's specific arguments surrounding the alleged failure to consolidate his juvenile offenses because, as we held in United States v. Keene, where the district court imposes a reasonable sentence and states that it would impose the same sentence irrespective of any sentencing calculation errors, this Court will uphold the sentence rather than "send the case back to the district court since it has already told us that it would impose exactly the same sentence, a sentence we would be compelled to affirm." 470 F.3d 1347, 1350 (11th Cir. 2006).

Here, like Keene, the district court stated it would have imposed 78 months as a reasonable sentence based on the 18 U.S.C. § 3553(a) imposition of a sentence factors. According to our decision in Keene, the relevant analysis is as follows: "the question then is whether the [78-month] sentence the court imposed is reasonable, assuming exactly the same conduct and other factors in the case, but

using an advisory range of [57-71] months."[2] 470 F.3d at 1350. In this case, Lopez's 78-month sentence was reasonable under the § 3553(a) factors because his criminal record and current offense show a disregard for the law, obstruction of justice and falsity, danger to the public, and a need to deter future transgressions. Therefore, the district court's imposition of Lopez's 78-month sentence was reasonable and stands despite the disputed guidelines issue.

IV.CONCLUSION

The district court judgment is **AFFIRMED**.

---

[2] This analysis assumes that the district court should have awarded Lopez a criminal history score of 3, which would have generated a criminal history category of II, leaving him with a guideline range of 57-71 months imprisonment.

United States Court of Appeals
For the Eleventh Circuit

No. 06-14918	FILED U.S. COURT OF APPEALS ELEVENTH CIRCUIT
District Court Docket No. 04-00072-CR-HLM-4	Feb 20, 2008 THOMAS K. KAHN CLERK

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHRISTOPHER MICHAEL DEAN,
RICARDO CURTIS LOPEZ,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Georgia

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: February 20, 2008
For the Court: Thomas K. Kahn, Clerk
By: Jackson, Jarvis

FILED IN CLERK'S OFFICE
U.S.D.C. Rome

SEP 05 2006

JAMES N. HATTEN, Clerk
By: Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

UNITED STATES OF AMERICA

-vs- **Case No. 4:04-CR-72-02-HLM**

CHRISTOPHER MICHAEL DEAN **Defendant's Attorney:**
SCOTT J. FORSTER, ESQ.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant was found guilty by a jury on **Count(s) One and Two (2) of the Indictment**.

Accordingly, the defendant is adjudged guilty of such count(s) which involves the following offense:

Title & Section	Nature of Offense	Count No.
18 U.S.C. 1951(a)	Armed Bank Robbery	1
18 U.S.C. 924(c)(1)(A)(iii) and 2	Discharge of a Firearm During an Armed Robbery	2

The defendant is sentenced as provided in pages 2 through of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay the special assessment of **$ 200.00** which shall be due immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within thirty days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid.

The Court finds that the defendant does not have the ability to pay a fine and a cost of incarceration. The Court will waive the fine and the cost of incarceration in this case.

Defendant's Soc. Sec. No. 8829 Date of Imposition of Sentence:
Defendant's Date of Birth: 1986 August 31, 2006
Defendant's Mailing Address:
Kingston, Georgia 30145

Signed this the 5 1 day of September, 2006.

/s/ Harold L. Murphy
HAROLD L. MURPHY
UNITED STATES DISTRICT JUDGE

4:04-CR-72-02-HLM : CHRISTOPHER MICHAEL DEAN

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **One Hundred (100) months** on Count One (1), and a term of **One Hundred Twenty (120) months** on Count Two, to be served consecutive to the term imposed on Count One (1) to produce a total term of **Two Hundred Twenty and 00/100 (220) months**. This sentence shall run consecutive to the sentence imposed in docket number 05-CR-28516-JFL002 in Floyd County Superior Court.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By: _____
Deputy U.S. Marshal

4:04-CR-72-02-HLM : CHRISTOPHER MICHAEL DEAN

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **Five (5) years.** This term consists of terms of three (3) years on Count One (1) and a term of Five (5) years on Count Two (2), with both such terms to run concurrently.

While on supervised release, the defendant shall not commit another federal, state or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard and special conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

1. The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

2. The defendant shall make restitution to the victim listed in the presentance report, jointly and severally with the co-defendants in this case to the following entity in the following amount:

   ASB $2,605.00.

3. The defendant shall notify the United States Attorney for this district within thirty (30) days of any change of mailing or residence address that occurs while any portion of the restitution remains unpaid.

4. The defendant shall submit to one (1) drug urinalysis within fifteen (15) days after being placed on supervision and at least two (2) periodic tests thereafter.

4:04-CR-72-02-HLM : CHRISTOPHER MICHAEL DEAN

5. The defendant shall participate in a drug/alcohol treatment program under the guidance and supervision of the United States Probation Officer and if able, contribute to the cost of services for such treatment.

6. The defendant shall make a full and a complete disclosure of his financial and submit to an audit of financial documents, at the request of the United States Probation Officer.

7. The defendant shall pay any financial penalty that is imposed by this judgment, and that remains unpaid at the commencement of the term of supervised release at a rate to be established by the United States Probation Officer in accordance with the Court Approved Payment Schedule, but in no event less than Two Hundred and 00/100 Dollars ($200.00) monthly.

8. The defendant shall not incur new credit charges or open additional lines of credit without the approval of the United States Probation Officer and unless the defendant is in compliance with the installment payment schedule.

9. The defendant shall not own, possess or have under his control any firearm, dangerous weapon or other destructive device.

10. The defendant shall submit to a search of his person, property (real, personal, or rental), residence, office and vehicle, at a reasonable time and in reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search my be grounds for revocation; the defendant shall warn any other residents that the premises may be subject to search pursuant to this condition.

4:04-CR-72-02-HLM : CHRISTOPHER MICHAEL DEAN

11. Pursuant to 42 U.S.C. §14135a(d)(1) and 10 U.S.C. §1565(d), which requires mandatory DNA testing for federal offenders convicted of felony offenses, the defendant shall cooperate in the collection of DNA as directed by the United States Probation Officer.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;

2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4. The defendant shall support his or her dependents and meet other family responsibilities;

5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6. The defendant shall notify the probation officer within 72 hours of any change in residence or employment;

4:04-CR-72-02-HLM : CHRISTOPHER MICHAEL DEAN

7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician, and shall submit to periodic urinalysis tests as directed by the probation officer to determine the use of any controlled substance;

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. The defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

4:04-CR-72-01-HLM : CHRISTOPHER MICHAEL DEAN

RESTITUTION

The defendant shall make restitution to the victim listed in the presentance report, jointly and severally with the co-defendants in this case to the following entity in the following amount:

ASB $2,605.00.

The defendant shall notify the United States Attorney for this district within thirty (30) days of any change of mailing or residence address that occurs while any portion of the restitution remains unpaid.

The defendant shall pay any financial penalty that is imposed by this judgment, and that remains unpaid at the commencement of the term of supervised release at a rate to be established by the United States Probation Officer in accordance with the Court Approved Payment Schedule, but in no event less than Two Hundred and 00/100 Dollars ($200.00) monthly.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

APR 15 2008

THOMAS K. KAHN
CLERK

No. 06-14918-EE

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHRISTOPHER MICHAEL DEAN,
RICARDO CURTIS LOPEZ,

Defendant-Appellant.

On Appeal from the United States District Court for the
Northern District of Georgia

BEFORE: HULL and PRYOR, Circuit Judges, and MOORE,* District Judge.

PER CURIAM:

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

*Honorable K. Michael Moore, United States District Judge for the Southern District of Florida, sitting by designation.

Jul-08-08 02:24p Scott Forster 7066255842 P.03

FILED IN CLERK'S OFFICE
U.S.D.C. Rome
NOV 15 2006
JAMES N. HATTEN, Clerk
By: Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

UNITED STATES OF AMERICA	)	DOCKET NO. 4:04-CR-0072
	)	
	)	ATLANTA, GEORGIA
V.	)	AUGUST 31, 2006
	)	
RICARDO CURTIS LOPEZ,	)	
CHRISTOPHER MICHAEL DEAN,	)	
	)	
DEFENDANTS.	)	

TRANSCRIPT OF SENTENCING HEARING
BEFORE THE HONORABLE HAROLD L. MURPHY,
UNITED STATES DISTRICT JUDGE

APPEARANCES OF COUNSEL:

FOR THE GOVERNMENT:	WILLIAM G. TRAYNOR ASSISTANT U. S. ATTORNEY
FOR THE DEFENDANT LOPEZ:	GILES JONES
FOR THE DEFENDANT DEAN:	SCOTT FORSTER
COURT REPORTER:	ANDY ASHLEY 1949 U. S. COURTHOUSE ATLANTA, GEORGIA 30303-3361 (404) 215-1478

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY, TRANSCRIPT PRODUCED BY COMPUTER.

PROCEEDINGS

(ROME, FLOYD COUNTY, GEORGIA; AUGUST 31, 2006 IN OPEN COURT.)

THE CLERK: I'LL SOUND THE CASES OF THE UNITED STATES OF AMERICA VERSUS RICARDO CURTIS LOPEZ AND CHRISTOPHER MICHAEL DEAN.

MR. TRAYNOR: WILL TRAYNOR FOR THE UNITED STATES, YOUR HONOR.

MR. FORSTER: SCOTT FORSTER FOR CHRISTOPHER DEAN.

MR. JONES: CHARLES JONES ATTORNEY FOR RICARDO CURTIS LOPEZ.

THE COURT: IS IT SATISFACTORY WITH COUNSEL AND THE PARTIES THAT WE HANDLE THESE CASES TOGETHER TO THE EXTENT APPROPRIATE?

MR. FORSTER: THAT'S FINE, YOUR HONOR.

MR. JONES: NO OBJECTION FOR MR. LOPEZ.

THE COURT: ALL RIGHT. IS THAT SATISFACTORY WITH YOU, MR. TRAYNOR?

MR. TRAYNOR: YES, YOUR HONOR.

THE COURT: MR. LOPEZ, HAVE YOU READ THIS PRESENTENCE REPORT AS PREPARED BY THE UNITED STATES PROBATION OFFICER AND BEEN OVER WITH IT YOUR LAWYER?

DEFENDANT LOPEZ: YES, SIR.

THE COURT: YOU UNDERSTAND IT FAIRLY WELL?

DEFENDANT LOPEZ: YES, SIR.

THE COURT: MR. DEAN, HAVE YOU READ THE PRESENTENCE

REPORT IN YOUR CASE AND BEEN OVER IT WITH YOUR LAWYER?

DEFENDANT DEAN: YES, SIR.

THE COURT: DO YOU UNDERSTAND IT FAIRLY WELL?

DEFENDANT DEAN: YES, SIR.

THE COURT: THE COURT HAS REVIEWED THE PRESENTENCE REPORT AS PREPARED BY THE UNITED STATES PROBATION OFFICER IN THE CASE OF THE UNITED STATES AGAINST MR. LOPEZ, AND THE COURT HAS ALSO REVIEWED ATTACHMENTS TO THAT PRESENTENCE REPORT WHICH CONSIST OF COPIES OF VARIOUS APPELLATE COURT CASES, THAT IS, DECISIONS, AND ALSO ATTACHED TO THE PRESENTENCE REPORT IS A COPY OF THE INDICTMENT IN THIS CASE, AND ALSO IS ATTACHED A COPY OF THE OBJECTIONS AND COMMENTS AS TO THE PRESENTENCE REPORT FILED ON BEHALF OF MR. LOPEZ BY MR. JONES.

THE COURT HAS ALSO REVIEWED THE ADDENDUM TO THE PRESENTENCE REPORT AS PREPARED BY THE UNITED STATES PROBATION OFFICER. THE COURT HAS FURTHER REVIEWED THE FINDINGS OF FACT AND CONCLUSIONS CONTAINED IN THE PRESENTENCE REPORT AS PREPARED BY THE UNITED STATES PROBATION OFFICER, AND THE COURT MAKES ALL OF THE FINDINGS OF FACT AND CONCLUSIONS CONTAINED IN THE PRESENTENCE REPORT AS TO MR. LOPEZ THE FINDINGS OF FACT AND CONCLUSIONS OF THE COURT IN ALL RESPECTS EXCEPT AS TO UNRESOLVED GUIDELINE ISSUES.

THE COURT PUTS INTO EVIDENCE FOR THE PURPOSES OF THE RECORD IN THIS CASE ALL THESE DOCUMENTS THAT I HAVE THUS FAR REFERRED TO. PLUS, THE COURT HAS RECEIVED AND REVIEWED A

TRANSCRIPT OF A PORTION OF THE TRIAL TESTIMONY IN THIS CASE CONSISTING OF THE TESTIMONY OF BOTH OF THE DEFENDANTS AT THE TRIAL AND THE TESTIMONY OF ONE OF THE INVESTIGATIVE OFFICERS WHO WAS A MAJOR INVESTIGATOR OF THIS INCIDENT, AND THAT IS PUT INTO THE RECORD.

THE COURT HAS ALSO RECEIVED FROM THE GOVERNMENT ITS RESPONSE TO THE OBJECTIONS FILED TO THE PRESENTENCE REPORT BY MR. LOPEZ AND BY MR. DEAN AND THAT'S PLACED INTO THE RECORD.

IN MR. DEAN'S CASE, THE COURT, OF COURSE, HAS REVIEWED THESE TRIAL TRANSCRIPTS I'VE JUST REFERRED TO THAT WERE TYPED UP BY THE COURT REPORTER, THAT IS, THE TESTIMONY AT TRIAL OF MR. LOPEZ AND MR. DEAN AND THE INVESTIGATIVE OFFICER THAT I JUST IDENTIFIED A MOMENT AGO.

THE COURT HAS REVIEWED THE INDICTMENT ATTACHED TO THE PRESENTENCE REPORT, SEVERAL CASES, APPELLATE COURT CASES ATTACHED TO THE PRESENTENCE REPORT AS TO CERTAIN ISSUES MADE AS OBJECTIONS TO THE PRESENTENCE REPORT.

THE COURT HAS ALSO REVIEWED AND THERE IS ATTACHED TO THE PRESENTENCE REPORT THE OBJECTIONS OF THE DEFENDANT IN SOMEWHAT DETAIL TO THE PRESENTENCE REPORT. ATTACHED ALSO IS THE ADDENDUM TO THE PRESENTENCE REPORT AS PREPARED BY THE UNITED STATES PROBATION OFFICER AND THE PRESENTENCE REPORTED ITSELF.

THE COURT HAS REVIEWED ALL OF THE FINDINGS OF FACT AND CONCLUSIONS CONTAINED IN THE PRESENTENCE REPORT PREPARED BY

THE UNITED STATES PROBATION OFFICER IN MR. DEAN'S CASE, AND THE COURT ADOPTS ALL THOSE FINDINGS OF FACT AND CONCLUSIONS AS CONTAINED IN THE PRESENTENCE REPORT AND MAKES THOSE FINDINGS OF FACT AND CONCLUSIONS THOSE OF THE COURT IN ALL RESPECTS EXCEPT AS TO UNRESOLVED GUIDELINE ISSUES.

AGAIN, THE COURT NOTES FOR THE PURPOSES OF THE RECORD THAT IT HAS RECEIVED AND REVIEWED THE MEMORANDUM IN RESPONSE TO DEFENDANT'S VARIOUS OBJECTIONS TO THE PRESENTENCE REPORT AND THAT IS MADE A PART OF THE RECORD IN THIS CASE.

THE COURT HAS REVIEWED IT AND HAS REVIEWED AN ELEVENTH CIRCUIT UNPUBLISHED APPELLATE COURT DECISION HAVING TO DO WITH ONE OF THE ISSUES TO WHICH EACH DEFENDANT HAS OBJECTED IN REFERENCE TO THE PRESENTENCE REPORT.

SO THE COURT PUTS ALL OF THESE DOCUMENTS INTO THE RECORD FOR THE PURPOSES OF THIS HEARING AND ANY LATER REVIEW OF THE COURT'S ACTIONS IN THIS CASE.

IN MR. LOPEZ' CASE AS IN MR. DEAN'S CASE, DEFENSE COUNSEL HAS FELT AT EASE TO MAKE ALL OBJECTIONS AND CRITICISMS OF THE PRESENTENCE REPORT THAT HE THOUGHT WOULD BE HELP HELPFUL TO HIS CLIENT IN ANY WAY.

MR. LOPEZ OBJECTS TO THE ENHANCEMENT FOR OBSTRUCTION OF JUSTICE AND OBJECTS TO THE CONCLUSION OF THE UNITED STATES PROBATION OFFICER AS TO THE MINIMUM SENTENCE REQUIRED, AND OBJECTS TO THE CRIMINAL HISTORY COMPUTATION AS BEING EXCESSIVE FOR CHARGING POINTS FOR RELATED CASES THAT SHOULD NOT HAVE BEEN

CHARGED TO THIS DEFENDANT. MR. FORSTER CARRIES ON THE VIEW OF MR. JONES AND SUPPLIES HIS LIST OF OBJECTIONS IN HIS CLIENT'S CASE.

IN MR. DEAN'S CASE, MR. FORSTER POINTS OUT THAT THE PROBATION OFFICER HAS ERRED IN MANY RESPECTS IN IMPOSING A -- WELL IN NOT GIVING ANY KIND OF CREDIT FOR A MITIGATING ROLE. HE COMPLAINS THAT THE PROBATION OFFICER HAS FOUND AND SUGGESTED THAT HIS CLIENT OBSTRUCTED JUSTICE.

HE THINKS THAT HIS CLIENT IS IMPROPERLY BEING DENIED ACCEPTANCE OF RESPONSIBILITY. HE DISAGREES WITH THE MINIMUM SENTENCE SUGGESTION MADE BY THE PROBATION OFFICER AS TO WHAT HE BELIEVES TO BE A CORRECT ENHANCEMENT.

HE ALSO DOES NOT AGREE WITH THE CRIMINAL HISTORY CATEGORY COMPUTATIONS. HE SAYS THEY ARE EXCESSIVE, AND HE ALSO SAYS THAT THEY OVERREPRESENT THE CRIMINAL HISTORY OF THE DEFENDANT, AND HE HAS COMMENTS AND OBJECTIONS AS TO THE STRUCTURE OF THE SENTENCE AS TO HIS PARTICULAR CLIENT.

MR. JONES, YOU WANT TO SPEAK TO YOUR CLIENT'S POSITIONS FIRST?

MR. JONES: YES, SIR. MAY IT PLEASE THE COURT, MR. TRAYNOR AND MR. FORSTER AND MY CLIENT RICARDO CURTIS LOPEZ, MR. LOPEZ DOES OBJECT TO THE THREE AFOREMENTIONED UNRESOLVED GUIDELINE ISSUES THAT THIS COURT HAS PREVIOUSLY POINTED OUT.

WITH REGARDS TO THE OBSTRUCTION OF JUSTICE, I'LL RELATE BACK TO MY MAIN ARGUMENT BACK IN THE OBJECTIONS TO THE

PRESENTENCE REPORT. INASMUCH AS MR. LOPEZ DID MAKE A COUPLE OF RATHER INCRIMINATING STATEMENTS AT THE TIME OF HIS ARREST, HOWEVER, HE DID PLEAD NOT GUILTY AT THE TIME OF ARRAIGNMENT, ADVISED ME OF THE ACTIONS OR THE POTENTIAL EXCULPATING EVENTS OF MR. DEAN AND WENT TO TRIAL AND TESTIFIED RIGHT THERE ON THAT STAND AS TO WHAT HE DID AND WHAT HE DID NOT DO.

IN REGARDS TO ANY ASPECTS ASSOCIATED WITH THE OBSTRUCTION OF JUSTICE AND THE COMMENTARY NOTES THAT WERE ADDRESSED IN THE APPLICATION NOTES FROM THE UNITED STATES SENTENCING GUIDELINES SECTION 3C1.1, MR. LOPEZ EXERCISED HIS CONSTITUTIONAL RIGHTS TO PLEAD NOT GUILTY, TO TESTIFY UNDER OATH THAT HE WAS NOT THE ONE INVOLVED, WAS NOT THE PERSON THAT DID WHAT HE DID.

WHETHER OR NOT HE MADE STATEMENTS AT ONE POINT TO IN PARTICULAR LAW ENFORCEMENT OFFICER CHUCK REID OF THE FBI, IT CERTAINLY DID NOT PRECLUDE SPECIAL AGENT REID FROM FURTHERING AND FOLLOWING UP ON THE INVESTIGATION AS TO WHAT MIGHT HAVE BEEN MR. DEAN'S INVOLVEMENT IN THIS ASPECT.

SIMPLY PUT HE DID NOT WILLFULLY OBSTRUCT OR IMPEDE. HE DID MAKE STATEMENTS AT THE BEGINNING OF THE INVESTIGATION. HE DID EXERCISE HIS CONSTITUTIONAL RIGHT OF PLEADING NOT GUILTY AND GOING TO TRIAL, AND HE DID GET UP ON THE STAND, AND HE WAS CONVICTED, AND OBVIOUSLY THE 12 JURORS THAT SAT IN JUDGMENT DID NOT BELIEVE HIS STORY, AND THAT'S THE ULTIMATE BASIS FOR HIS BEING FOUND GUILTY.

BUT I WOULD ASK AND WOULD SUPPLEMENT THAT HE DID NOT PROVIDE ANY MATERIALLY FALSE INFORMATION TO THE JURY. HE DIDN'T LIE. HE STATED WHAT HE STATED. NOW THEY JUST DID NOT BELIEVE HIM, AND I WOULD HOPE AND EXPECT THERE IS A FANTASTIC DIFFERENCE BETWEEN THAT IS WHAT IS NOT BELIEVED AND WHAT IS BELIEVED. SO IT GOES TO, I WOULD SAY, AN ISSUE OF CREDIBILITY INSTEAD OF AN ISSUE OF LYING OR PROVIDING MATERIAL FALSE INFORMATION TO YOUR HONOR AND TO THE COURT INCLUDING THE JURORS THAT SAT IN JUDGMENT.

THE SECOND ASPECT THAT I WOULD ARGUE IS THAT THE PROPER SENTENCE UNDER THE FIREARM PROVISION OF SECTION 924(C) IS THE 7-YEAR MINIMUM FOR HE DID BRANDISH A FIREARM. I WOULD POINT TO THE CASE OF THE UNITED STATES DISTRICT OF COLUMBIA WHICH IS THE UNITED STATES OF AMERICA VERSUS KEVIN PATRICK LUKE BROWN. I BELIEVE YOU'VE GOT A COPY AFTER THAT CASE, AND CERTAINLY WON'T GO BACK INTO THE FACTS, BUT THAT CASE IS THE ULTIMATE CASE ON POINT.

THOUGH IT'S NOT IN THE ELEVENTH CIRCUIT, IT IS A SITUATION WHERE IT WAS AN ACCIDENTAL DISCHARGE, AND THE D.C. DISTRICT COURT FOUND THAT THE PROPER DETERMINATION WAS A 7-YEAR MINIMUM SENTENCE.

I HAVE REVIEWED WHAT MR. TRAYNOR HAS PRODUCED IN HIS OBJECTIONS, MAINLY THE BRANTLEY CASE AND THE UNPUBLISHED CASE OF -- I FORGET WHAT CASE THAT IS. I'M NOT SURE HOW AN UNPUBLISHED CASE COMES INTO PLAY IN THIS REGARDS, BUT I

UNDERSTAND THAT THE ELEVENTH CIRCUIT UNDER BRANTLEY LOOKS AT THIS AS BEING A STRICT CONSTRUCTION. YOU DON'T NEED TO HAVE GENERAL KNOWLEDGE.

I WOULD POINT OUT THAT IN THE BRANTLEY CASE THAT WAS AN ISSUE OF I DIDN'T KNOW THAT THE GUN I WAS HANDLING AT THE TIME HAD BEEN MANIPULATED TO MAKE IT A FULLY AUTOMATIC ASSAULT RIFLE. IN THIS SITUATION IT'S MORE OF AN ASPECT OF THE ACCIDENTAL DISCHARGE OF A FIREARM DURING THE COMMISSION OF THIS BANK ROBBERY.

AGAIN, EVEN THE TESTIMONY FROM, I BELIEVE IT WAS NORA HALL AND HER STATEMENT IN THE PRESENTENCE REPORT, IN THE FINAL PRESENTENCE REPORT THAT SHE DID NOT BELIEVE THAT IT HAD GONE OFF WAS, I BELIEVE, THE MOST TELLING TESTIMONY OF THE WHOLE SITUATION.

CERTAINLY THE ELEVENTH CIRCUIT HAS THE BRANTLEY DECISION, AND I DON'T KNOW IF THE CLARET CASE, WHICH IS NONPUBLISHED, I DON'T -- AGAIN I'M NOT CERTAIN AS TO HOW A NONPUBLISHED CASE CREATES STARE DECISIS, BUT I WOULD HOPE THAT IT DOES NOT, AND IF IT DOES NOT, THE PROPER CASE ON POINT IS THE DISTRICT COURT OF THE DISTRICT OF COLUMBIA, AND I WOULD ASK THAT THE 7-YEAR MINIMUM OR THE 7-YEAR ENHANCEMENT WOULD BE PROPER VERSUS THE 10-YEAR ENHANCEMENT.

FINALLY, SIR, THE ARGUMENT THAT IS ASSOCIATED WITH HIS CRIMINAL HISTORY, THE EVENTS THAT OCCURRED BACK IN, I WANT TO SAY, JULY OF 1997 IN NEWTON COUNTY WHERE THERE WAS FOUR OR

FIVE DAY SPREE BY MY CLIENT, MAYBE IT WAS A THREE TO FOUR DAY SPREE WHERE HE USED THE SAME WEAPON, WHICH I THINK WAS A BB GUN, HE WENT TO I THINK AN INDIAN-OWNED CONVENIENCE STORE AND ON SUCCESSIVE DAYS ROBBED THROUGH AN ACT OF VIOLENCE THESE THREE I WANT TO SAY, NO MORE THAN FOUR CONVENIENCE STORES.

THE PROBATION OFFICER JEFFERS KINDLY POINTS OUT THE UNITED STATES VERSUS SMITH, WHICH IS 385 F.3D, 1342, AS THE CASE THAT STATES THAT WITHOUT A FORMAL CONSOLIDATION ORDER THAT THE EVENTS SHOULD BE CONSIDERED SEPARATELY.

AGAIN, THERE ARE FACTS IN THIS SMITH CASE THAT ARE COMPLETELY DIFFERENT FROM THIS CASE. THE SMITH CASE DEALS WITH OVER A THREE-DAY PERIOD OF TIME WHERE THERE WAS MORE RANDOMNESS IN DEFENDANT SMITH'S ACTIONS DURING HIS COURSE OF CRIMINAL CONDUCT AND ENTERPRISE.

FORTUNATELY FOR MR. LOPEZ THE EVENTS THAT OCCURRED WERE BASICALLY OF THE SAME OCCASION, OF THE SAME EVENT, OF THE SAME TRANSACTION, OF THE SAME VICTIMS AND OF THE SAME VICTIMS'S LOCATIONS.

I WOULD ALSO ADD THAT THROUGH THE COURT, THE JUVENILE COURT HE WAS SENTENCED TO AN -- I THINK THE PRESENTENCE REPORT SHOWS A FOUR-YEAR COMMITMENT. MY CLIENT IS ADAMANT THAT IT WAS A FIVE-YEAR COMMITMENT, AND TO FURTHER SHOW THAT THIS IS ONE SIMILAR TRANSACTION, HE WAS SENTENCED TO ONE OFFENSE UNDER ONE SENTENCING AND BASED UPON O.C.G.A. SECTION 15-11-63, WHICH IS THE DESIGNATED FELONY ACTS AND RESTRICTED CUSTODIES, THAT THE

LONGEST PERIOD OF TIME THAT A JUVENILE AS IN MR. LOPEZ' CASE AT THAT TIME COULD BE SENTENCED FOR NO MORE THAN 60 MONTHS.

SO THE THREE OR FOUR EVENTS THAT OCCURRED BACK IN JULY OF 1997 WAS NOT TAKEN UP BY THE SUPERIOR COURT IN NEWTON COUNTY, WAS A JUVENILE COURT MATTER, WHETHER IT WAS OUT OF ADMINISTRATIVE CONVENIENCE THAT THEY SENTENCED MR. LOPEZ, THEY DID SENTENCE HIM TO ONE SENTENCE COMBINING ALL FOUR OF THE THREE OR FOUR -- I THINK IT'S FOUR CRIMINAL ACTIONS, BUT I WOULD ALSO ADD, AS HOPEFULLY A LITTLE EXTRA BITE TO THE ARGUMENT, THAT THE STATUTE, AGAIN THAT IS O.C.G.A. SECTION 15-11-63, ONLY ALLOWS FOR A FIVE-YEAR COMMITMENT IN THE DEPARTMENT OF JUVENILE JUSTICE SYSTEM.

I WOULD ASK THAT YOU INCORPORATE THOSE ARGUMENTS AND DETERMINE THAT MR. LOPEZ' PROPER CRIMINAL OR HIS PROPER -- EXCUSE ME, SIR, HIS PROPER OFFENSE LEVEL SHOULD BE A 22, AND HIS CRIMINAL HISTORY SHOULD BE A CATEGORY 2 WITH COUNT 2 RUNNING CONSECUTIVE BEING A 7-YEAR CONSECUTIVE SENTENCE INSTEAD OF A 10-YEAR CONSECUTIVE SENTENCE.

I'D ALSO ADD -- I'M PROBABLY JUMPING AHEAD. I'LL WAIT FOR THE ISSUE OF RESTITUTION TO BE ADDRESSED, BUT I WOULD ASK THAT THOSE THREE ISSUES BE RULED UPON IN MR. LOPEZ' FAVOR.

THANK YOU, SIR.

THE COURT: THANK YOU, MR. JONES. MR. TRAYNOR, DO YOU WANT TO REPLY NOW OR YOU WANT TO WAIT UNTIL WE HEAR FROM MR. FORSTER?

MR. TRAYNOR: YOUR HONOR, GIVEN THE SIMILARITY BETWEEN MANY OF THEIR OBJECTIONS, I'D BE GLAD TO WAIT FOR MR. FORSTER.

THE COURT: THAT MIGHT BETTER FOR BOTH CASES THAT WE HANDLE IT THAT WAY.

YOU WANT TO SPEAK TO HIS SITUATION THEN, MR. FORSTER?

MR. FORSTER: IF IT PLEASE, YOUR HONOR, I'VE FILED SEVERAL OBJECTIONS. I SUPPOSE JUST THE ORDER I WROTE THEM. THEY HAVE AN INCREASE FOR TWO LEVELS IN OBSTRUCTION OF JUSTICE IN PARAGRAPH 32 OF THE PSR, WE OBJECT TO THAT. HE CONFESSED. HE'S GOING TO GET -- HE'S BRINGING A LOT MORE JUSTICE ON HIMSELF AT THIS POINT BASED ON HIS CONDUCT. TO SAY HE HAS OBSTRUCTED JUSTICE, HE HAS OFFERED TO PLEAD GUILTY FROM DAY ONE. HE HAS CONFESSED.

IT'S INCOMPREHENSIBLE TO SAY THAT WITH REGARDS TO HIS OWN CONDUCT, HE HAS OBSTRUCTED JUSTICE. I THINK HE'S SUBJECTING HIMSELF TO FAR MORE JUSTICE BECAUSE OF HIS OWN CONDUCT. I DON'T THINK IT'S OBSTRUCTION.

THIS PSR DOES NOT GIVE HIM ANY ACCEPTANCE OF RESPONSIBILITY. THE APPLICATION NOTES UNDER ACCEPTANCE TALK ABOUT GOING TO TRIAL DOES NOT PER SE MEAN YOU DON'T GET ACCEPTANCE.

THE APPLICATION NOTE 2, A DETERMINATION THAT A DEFENDANT HAS ACCEPTED RESPONSIBILITY WILL BE BASED PRIMARILY

UPON PRETRIAL STATEMENTS AND CONDUCT.

IN THIS CASE HE WROTE THE COURT LETTERS WANTING TO PLEAD GUILTY. HE WROTE THE U.S. ATTORNEY'S OFFICE WANTING TO PLEAD GUILTY. HE TOLD ME ENOUGH TIMES HE WANTED TO PLEAD GUILTY, AND THEN HE GETS ON THE WITNESS STAND AND CONFESSES TO A JURY OF HIS CONDUCT. I DON'T KNOW HOW YOU CAN ACCEPT RESPONSIBILITY ANY MORE THAN HE DID.

TO THE EXTENT HE DID NOT ACKNOWLEDGE THE GOVERNMENT'S VERSION OF THE FACTS IN THIS CASE BUT HE ACCEPTED A WHOLE LOT MORE RESPONSIBILITY IN THIS CASE THAN I WISH HE HAD, AND I JUST DON'T HOW HE COULD ACCEPT ANYMORE, JUDGE, SO WE WOULD ASK FOR TWO LEVELS FOR ACCEPTANCE.

I DO PUT IN THERE THAT EVEN ASSUMING SOME OBSTRUCTION, WHICH I DON'T ASSUME, BUT EVEN IF I ADMITTED THAT, HE CAN STILL GET OBSTRUCTION AND ACCEPTANCE, AND THAT'S APPLICATION NOTE 4, CONDUCT RESULTING IN THE OBSTRUCTION ENHANCEMENT ORDINARILY INDICATES THAT A DEFENDANT HAS NOT ACCEPTED RESPONSIBILITY FOR HIS CRIMINAL CONDUCT, THERE MAY, HOWEVER, BE EXTRAORDINARY CASES IN WHICH ADJUSTMENTS OF BOTH ACCEPTANCE AND OBSTRUCTION APPLY.

THE COURT: I'VE SEEN A CASE LIKE THAT. I AGREE WITH THAT.

MR. FORSTER: I THINK AT THE VERY WORST THAT'S WHAT THIS IS. I DON'T THINK YOUR HONOR SHOULD GIVE HIM ANY OBSTRUCTION, AND I DO THINK YOU SHOULD GIVE HIM A COUPLE OF

POINTS FOR ACCEPTANCE.

THE COURT: MR. TRAYNOR MAY BE WILLING TO MAKE A RECOMMENDATION AS TO THE THIRD POINT. WE'LL SEE WHAT HE HAS TO SAY.

MR. FORSTER: I WOULDN'T OBJECT IF THAT'S WHAT HE WANTED.

THE COURT: GO AHEAD. I DIDN'T WANT TO INTERRUPT YOUR FLOW.

MR. FORSTER: LET'S SEE, I OBJECT TO THE SEVEN YEARS VERSUS THE TEN YEARS. WE CITE THAT D.C. CIRCUIT CASE U.S.A. VERSUS BROWN. I DON'T THINK THERE'S ANY REAL DISPUTE THAT THE GUN IN THIS CASE WENT OFF ACCIDENTALLY.

THEY COULDN'T FIND THE BULLET. I REMEMBER IN SOME OF THE EVIDENCE THAT WHEN THEY WERE ASKING MR. LOPEZ IN HIS INTERVIEW ABOUT THE GUN, HE GOT ALL NERVOUS, AND THEY TALKED ABOUT THAT. HE WASN'T SURE WHETHER HE ALMOST SHOT HIMSELF. SO I THINK THERE'S NO REAL DISPUTE THAT THE GUN WENT OFF ACCIDENTALLY.

I HAVE BEEN PROVIDED THIS UNPUBLISHED ELEVENTH CIRCUIT OPINION. WE PROVIDED THE D.C. CIRCUIT FROM JUNE OF 06, AND WE WOULD ASK THE COURT TO ACCEPT THE LEGAL CONCLUSIONS OF THE D.C. CIRCUIT, SEVEN YEARS CONSECUTIVE RATHER THAN TEN.

LET'S SEE, I MAKE SOME OBJECTIONS REGARDING CRIMINAL HISTORY. THE FIRST ONE IS THAT IT WASN'T PROVED TO A JURY. I AM DOING THAT TO PRESERVE AN ISSUE. I UNDERSTAND WHAT THE LAW

IS, THAT WHOLE LINE OF EXCEPTIONS ON ALMENDAREZ-TORRES. I'M AWARE OF ALL THAT. I'M JUST PRESERVING AN ISSUE ON THE CHANCE THAT THAT LAW CHANGES. I DON'T EXPECT THAT IT WILL, BUT I WANT TO AT LEAST PRESERVE MY ISSUE.

I OBJECT TO PARAGRAPH 44 FOR TWO CRIMINAL HISTORY POINTS -- WAIT A MINUTE, LET'S SEE, NO, YOUR HONOR, I WROTE THE WRONG NUMBER DOWN. I WROTE 44 BUT THEY DIDN'T GIVE HIM TWO POINTS FOR 44, YOUR HONOR.

THE PROBATION OFFICER: YOUR HONOR, IF I MAY, HE DID IN FACT OBJECT TO 44. TWO POINTS WERE ASSESSED IN THE INITIAL REPORT. THOSE WERE LATER REDACTED.

MR. FORSTER: OKAY. I WIN THEN. I'LL MOVE ON. I ARGUE THAT THE -- WELL, LET'S SEE. YOUR HONOR, I ALSO SUGGEST TO THE COURT THAT THE ENTIRETY OF THE CRIMINAL HISTORY OVERSTATES. SOME OF THIS, A GOODLY AMOUNT OF THIS CRIMINAL HISTORY WAS JUVENILE. SOME AMOUNT OF THIS CRIMINAL HISTORY OCCURRED AFTER THE INCIDENT THAT THEY GOT ARRESTED FOR. IT WAS A JAIL ISSUE THAT THEY HAD. IT'S CITED IN HERE.

MY CLIENT GOT A SPLIT SENTENCE. THAT'S WHAT HE GOT IT FROM WAS SOMETHING THAT IN THE PRESENTENCE REPORT LEADS TO THREE CRIMINAL HISTORY POINTS.

I WOULD THINK JUST THE ENTIRETY OF THE CRIMINAL HISTORY POINTS AND THE WAY I READ THAT, SOME OF IT BEING JUVENILE, SOME OF IT BEING AFTER THE INCIDENT THAT TOOK PLACE HERE, WE WOULD JUST ASK THE COURT TO GO FROM SIX TO FOUR ON

CRIMINAL HISTORY. I THINK YOUR HONOR WOULD HAVE AUTHORITY TO DO THAT, AND I THINK THAT'S WHAT WE WOULD SAY IS THE PROPER CRIMINAL HISTORY LEVEL TO END UP AT.

OKAY. LET'S SEE, REQUEST FOR CONCURRENT SENTENCE, WHICH IS MY NUMBER 4, I ADMIT THAT COUNT 2 HAS TO RUN CONSECUTIVE. HE IS SERVING STATE TIME NOW, A 25 TO DO 12, THAT'S THE SPLIT SENTENCE THAT I TALKED ABOUT.

I UNDERSTAND THAT THE 924(C) COUNT HAS TO RUN CONSECUTIVE TO THE STATE COURT. THE SUPREME COURT IS CLEAR ON THAT AND CONSECUTIVE TO COUNT 1, FEDERAL CHARGE. THE COUNT 1, THE BANK ROBBERY, DOES NOT HAVE TO RUN CONSECUTIVE TO THE STATE CHARGE.

SO I'M ASKING -- THE PRESENTENCE REPORT SAYS HE CAME INTO FEDERAL CUSTODY ON, I THINK IT SAID NOVEMBER 10TH OF 04 IS THE ARREST DATE AND IN FEDERAL CUSTODY THE ENTIRE TIME.

WE WOULD ASK FOR THE COURT'S SENTENCE ON COUNT 1 TO RUN CONCURRENTLY WITH THE STATE SENTENCE. COUNT 2 THE COURT DOESN'T HAVE ANY AUTHORITY, I ACCEPT THAT, BUT 5G1.3, THE COURT HAS THE AUTHORITY TO RUN THE SENTENCE CONCURRENT. WE ARE ASKING YOU TO DO THAT.

AND THE LAST ARGUMENT I MAKE, I WASN'T SURE HOW TO COUCH IT OTHER THAN TO SAY MITIGATING ROLE. I UNDERSTAND WHAT THE VERDICT WAS. YOUR HONOR SAT THROUGH THE EVIDENCE FOR THREE DAYS, JUST LIKE EVERYBODY ELSE DID. I THINK THAT IF THIS CASE WERE TRIED TODAY, THERE MIGHT BE A DIFFERENT RESULT.

I COULDN'T EVER LOOK AT A JURY WITH A STRAIGHT FACE AND SAY SOMEBODY CONFESSED TO A CRIME THEY DIDN'T DO. I'D SAY THAT TO MY PARENTS, BUT THEY'D LOOK AT ME LIKE I'M CRAZY, AND THEN THIS JON BENET RAMSEY THING HAPPENS, AND PEOPLE DO CONFESS TO CRIMES THEY DIDN'T DO. IT DOESN'T HAPPEN OFTEN BUT IT DOES HAPPEN.

THIS NEVER WAS A CONSPIRACY CASE, JUDGE. AS I SAY THIS IS THE POINT WHERE UNDER THE SENTENCING STATUTE THE COURT HAS TO GIVE A SENTENCE SUFFICIENT BUT NOT GREATER THAN NECESSARY TO MEET ALL THE REQUIREMENTS, AND YOUR HONOR HEARD THE EVIDENCE.

THEY ARE NOT -- MY ONLY PERSONAL OPINION IS I DON'T THINK CHRIS EVER DID THIS THING BUT HE CONFESSED AND I UNDERSTAND ALL THAT, BUT EVEN THE GOVERNMENT'S RECITATION OF WHAT HE THINKS THE FACTS WOULD BE WOULD MEAN THAT MY CLIENT IS LESS CULPABLE.

ARGUABLY HE DROVE THE CAR. AGAIN I DON'T THINK THERE WAS ANY EVIDENCE ON THAT, BUT THAT'S HOW THE GOVERNMENT ARGUED THAT THIS WAS A CONSPIRACY. WHICH MEANS IT'S VERY POSSIBLE THAT EVEN IF HE KNEW OF A GUN, HE DIDN'T KNOW IT WOULD BE DISCHARGED.

I DIDN'T KNOW ANOTHER WAY TO COUCH THIS OTHER THAN LESSER ROLE, AND THE COURT HAS AUTHORITY. SO WE'RE ASKING FOR -- I MEAN YOUR HONOR HEARD THE EVIDENCE. SENTENCE THEM ACCORDING TO WHAT THE EVIDENCE CALLS FOR.

WE WOULD ASK FOR ACCEPTANCE. WE WOULD ASK FOR NO OBSTRUCTION. WE WOULD ASK FOR A CONCURRENT SENTENCE. WE WOULD ASK FOR CRIMINAL HISTORY 4 AND SEVEN YEARS RATHER THAN TEN. I THINK THAT'S COVERS IT. THANK YOU, YOUR HONOR.

THE COURT: THANK YOU, MR. FORSTER. YOU, GENTLEMEN, HAVE VERY THOROUGHLY REVIEWED THESE CASES AND SUBMITTED OBJECTIONS THAT I COMMEND YOU FOR YOUR THOROUGHNESS, BOTH OF YOU, IN HANDLING THIS.

MR. TRAYNOR.

MR. TRAYNOR: GOOD AFTERNOON, YOUR HONOR. YOUR HONOR, I WOULD REPLY PRIMARILY ON OUR WRITTEN RESPONSE TO THE DEFENDANT'S OBJECTIONS.

OUR POSITION IS THAT THE NORTH STAR IN THIS CASE IN THIS SENTENCING HEARING IS THE DEFENDANTS WERE CHARGED WITH AND CONVICTED OF CONSPIRACY AND AIDING AND ABETTING. THOSE ARE THE CHARGES THAT THE GRAND JURY INDICTED THEM ON. THOSE ARE THE CHARGES THEY HAVE BEEN CONVICTED OF.

NOW AS FAR AS ACCEPTANCE OF RESPONSIBILITY, NEITHER OF THEM HAVE EVER ACCEPTED RESPONSIBILITY FOR THE CONSPIRACY AND THE AIDING AND ABETTING. THEY HAVE NEVER -- THEY BOTH GOT ON THE STAND AND CONTINUED TO DENY THAT, AND SO WE CAN'T SEE HOW THEY SHOULD GET ANY CREDIT FOR ACCEPTING RESPONSIBILITY WHEN THEY HAVE DENIED AND CONTINUE TO DENY THE CHARGES THEY WERE CONVICTED OF.

NOW ON THE OBSTRUCTION OF JUSTICE, MR. LOPEZ FIRST

TOOK SOLE RESPONSIBILITY FOR THE ROBBERY. THEN HE RECANTED AT TRIAL AND TOLD US ALL ABOUT THIS CHOPSHOP OPERATOR AND THIS DRUG DEALER WHO HE NEVER WOULD NAME.

PEOPLE ARE CERTAINLY ENTITLED TO PLEAD NOT GUILTY, GO TO TRIAL AND TESTIFY AND TESTIFY AND HAVE THE JURY NOT BELIEVE THEM, AND I CERTAINLY UNDERSTAND THAT NOT EVERY DEFENDANT WHO IS IN THAT SITUATION SHOULD GET THE ENHANCEMENT FOR OBSTRUCTION OF JUSTICE.

BUT IN THIS CASE BOTH MR. LOPEZ AND MR. DEAN HAVE REALLY GONE FAR BEYOND THAT, FAR BEYOND JUST GETTING UP AND DISAGREEING WITH OTHER FACT WITNESSES IN THE CASE. THEY'VE JUST TRIED TO MANIPULATE THE INVESTIGATORS INTO TRYING TO GET THE OUTCOME OF APPARENTLY WHAT THEY WANTED IS MR. LOPEZ TO BE COMPLETELY EXCULPATED AND THEN MR. DEAN WOULD TAKE THE ENTIRE HIT FOR THEM.

SO IN THIS CASE WE THINK THEY HAVE GONE FAR BEYOND JUST GIVING FALSE TESTIMONY AT TRIAL AND THAT THEY BOTH SHOULD RECEIVE THE ENHANCEMENT FOR OBSTRUCTION OF JUSTICE.

ON THE 924(C) ISSUE, THE IMPORTANT PART OF THE UNPUBLISHED CASE, THE CLARET CASE, IS THAT THEY APPLY THE ELEVENTH CIRCUIT PUBLISHED DECISION IN BRANTLEY, AND BRANTLEY IS THE CASE MR. JONES DISCUSSED A MINUTE AGO ABOUT THE POSSESSION OF THE MACHINE GUN, AND IN THE BRANTLEY CASE, THE ELEVENTH CIRCUIT DISTINGUISHES BETWEEN SUBSTANTIVE OFFENSES WHICH REQUIRE A SEPARATE MENS REA AND SENTENCE ENHANCEMENTS,

AND IT FOUND THAT THESE DIFFERENT DIVISIONS IN 924(C) WERE SENTENCE ENHANCEMENTS THAT DID NOT REQUIRE A SEPARATE MENS REA, AND THEN THAT'S WHAT THEY APPLY IN CLARET TO REJECT THE DEFENDANT'S ARGUMENT THAT THEY SHOULD NOT RECEIVE THE TEN YEARS BECAUSE THE FIREARM DISCHARGE WAS ACCIDENTAL.

SO WE THINK THAT THE CLARET DECISION IN ITSELF BEING AN UNPUBLISHED OPINION IS A GOOD INDICATOR OF WHAT THE ELEVENTH CIRCUIT WOULD DO IN THIS APPEAL WITH THIS ISSUE, AND THEN THE CLARET OPINION ALSO SHOWS US HOW THE ELEVENTH CIRCUIT WOULD APPLY THE PUBLISHED PRECEDENT OF BRANTLEY IN ACCORD WITH THE TENTH CIRCUIT OPINION THAT REJECTS THE DEFENDANT'S ARGUMENT. SO WE THINK THE PROBATION OFFICER IS RIGHT IN RECOMMENDING THE 10-YEAR SENTENCE UNDER 924(C).

MR. LOPEZ' OBJECTIONS ABOUT THE CRIMINAL HISTORY, AGAIN WE BELIEVE THE PROBATION OFFICER HAS GOT IT RIGHT UNDER THE SMITH CASE. THERE WERE SEVERAL ROBBERIES IN A SHORT PERIOD OF TIME WHERE THEY WERE DIFFERENT OCCASIONS, DIFFERENT ROBBERIES, DIFFERENT VICTIMS, IT'S NOT A COMMON SCHEME, THEY WEREN'T CONSOLIDATED, THERE'S NOTHING THAT APPEARS THEY WERE FUNCTIONALLY CONSOLIDATED, SO WE THINK UNDER CHAPTER 4 OF THE GUIDELINES THEY ARE SEPARATE OFFENSES.

MR. DEAN'S OBJECTIONS, HE CONTESTS THE CRIMINAL HISTORY SCORE BECAUSE THE SENTENCE FOR SOME OF THE THINGS -- THE JAIL RIOT HAPPENED AFTER HE WAS ARRESTED IN THIS CASE. CHAPTER 4 OF THE SENTENCING GUIDELINES, AND ESPECIALLY

APPLICATION NOTE 1.2, FOCUS OF PRIOR SENTENCES NOT PRIOR CONVICTIONS. THESE ARE ALL PRIOR SENTENCES BEFORE THIS CASE, AND SO WE BELIEVE THAT THE PSR IN CORRECT IN ASSESSING MR. DEAN'S CRIMINAL HISTORY.

AND THEN FINALLY THE REQUEST FOR A CONCURRENT SENTENCE, I THINK THE COURT KNOWS I'VE HAD CASES WHERE I'VE RECOMMENDED CONCURRENT SENTENCES. I WAS THINKING ABOUT MR. CRAWFORD, THE MAN WHO WAS DIGGING HOLES OUT IN THE BATTLEFIELD, AND THEN MR. GLOVER, THE MAN WHO WAS -- HE WAS FISHING AND HE HAD A PISTOL. HE WAS A CONVICTED FELON. HE HAD A PISTOL ALLEGEDLY TO SHOOT SNAKES AND HE ALSO HAD A BACKPACK WITH A LITTLE VIAL FULL OF METHAMPHETAMINE.

THOSE WERE CASES WHERE THEY ALREADY HAD BIG STATE SENTENCES LIKE MR. DEAN AND THE FEDERAL SENTENCE WASN'T GOING TO ADD MUCH, AND UNDER THE SENTENCING FACTORS OF 3553, IT SEEMED TO BE JUST THAT THEY SHOULD BE CONCURRENT SENTENCES AND I RECOMMENDED THAT.

IN THIS CASE WE HAVE A 19-YEAR-OLD MAN WHO I THINK THE REMARKABLE THING ABOUT THIS CASE IS AT 19 HE'S ALREADY WORKED HIS WAY TO CRIMINAL HISTORY 6, AND SO UNDER THE SENTENCING FACTORS OF 3553 THE COURT NEEDS TO -- HIS CRIMINAL HISTORY MAKES IT ESPECIALLY IMPORTANT FOR THE COURT TO CONSIDER HIS FUTURE DANGEROUSNESS AND THE NEED TO PROTECT THE PUBLIC FROM SOMEONE WHO HAS SUCH VIOLENT TENDENCIES.

IN ADDITION, PART OF HIS SENTENCE IN THE CONVICTION

HE GOT FOR THE JAIL RIOT WAS FOR VIOLATING HIS PROBATION, WHICH ESPECIALLY AT THAT STAGE OF THE GAME SHOWS A TREMENDOUS DISREGARD FOR COURT ORDERS IN HIS SENTENCES, AND SO UNDER THE SENTENCING FACTORS OF 3553 WE CANNOT RECOMMEND A CONCURRENT SENTENCE FOR MR. DEAN ON THE BANK ROBBERY COUNT.

THANK YOU.

THE COURT: DO ANY OF YOU WANT TO PUT IN EVIDENCE THE RECORDS THE PROBATION OFFICER HAS CONCERNING MR. LOPEZ' VARIOUS TRIALS OR TRIBULATIONS IN THE JUVENILE COURT SYSTEM.

MR. JONES: I HAVE NOT SEEN IT, SIR.

THAT'S FINE.

THE COURT: THE COURT HAD ASKED FOR THESE DOCUMENTS AND REVIEWED THEM, AND I'LL PUT THEM IN THE RECORD. THEY NEED TO BE IN THE RECORD FOR THE BENEFIT OF THE PARTIES.

THE TESTIMONY THAT WAS TRANSCRIBED BY ONE OF THE LAW ENFORCEMENT OFFICERS THAT I REFERRED TO EARLIER WAS AGENT REID, THE COURT INDICATED IT HAD REVIEWED IT.

EACH OF THE DEFENDANTS IN THIS CASE HAS OBJECTED TO THEIR RESPECTIVE PRESENTENCE REPORT ON THE GROUNDS THAT THE PROBATION OFFICER ADDED A TWO-POINT ENHANCEMENT FOR OBSTRUCTION OF JUSTICE.

THE COURT OVERRULES THE OBJECTION OF EACH DEFENDANT AS TO THAT ENHANCEMENT AND ACCEPTS THE POSITION OF THE PROBATION OFFICER AND THE POSITION OF THE GOVERNMENT.

I WILL POINT OUT FOR THE PURPOSE OF THE RECORD AND

FOR THE BENEFIT OF THE PARTIES AND COUNSEL THAT THIS IS A CASE IN WHICH EACH DEFENDANT CLEARLY, PURPOSELY, INTENTIONALLY OBSTRUCTED JUSTICE.

MR. LOPEZ GAVE GREAT DETAILS ABOUT THIS ROBBERY SHORTLY AFTER IT OCCURRED. THEN HE TOOK THE WITNESS STAND AND TESTIFIED EXACTLY OPPOSITE.

MR. DEAN, AFTER HE GOT A SENTENCE OF CONSIDERABLE LENGTH IN THE STATE COURT SYSTEM HERE IN FLOYD COUNTY, APPARENTLY DECIDED THAT HE WOULD TAKE THE FALL FOR HIS BROTHER-IN-LAW SINCE HE ALREADY HAD TIME TO SERVE, AND I SUSPECT HE FELT SURE THAT ANY SENTENCE IN THIS COURT WOULD BE CONCURRENT WITH ANY SENTENCE HE HAS IN THE STATE COURT SYSTEM OR LIKELY THE OTHER AUTHORITIES OTHER THAN THE COURTS WOULD SEE THAT THEY RAN CONCURRENT, SO HE WOULD PROTECT HIS BROTHER-IN-LAW AGAINST HAVING ANY TIME TO SERVE. SO HE TOOK THE WITNESS STAND, TESTIFIED ABOUT HOW HE COMMITTED THIS OFFENSE.

BOTH THE -- I WOULD USE A WORD WITH REFERENCE TO EACH OF THESE DEFENDANTS THAT I SELDOM USE AS TO ANY WITNESS THAT TESTIFIES, AND I'VE HEARD TESTIMONY IN COURT FOR MANY YEARS, TESTIMONY MANY TIMES OF A LAWYER, AND I DON'T EASILY CALL PEOPLE LIARS, BUT EACH OF THE DEFENDANTS IN THIS CASE PURPOSELY LIED WITH AN INTENT TO OBSTRUCT JUSTICE. SO THE ENHANCEMENT IS APPROPRIATE FOR BOTH OF THEM.

NEITHER OF THEM IS ENTITLED TO CREDIT FOR ACCEPTANCE

OF RESPONSIBILITY. AS POINTED OUT BY MR. TRAYNOR, NEITHER OF THEM HAVE EVER ACCEPTED RESPONSIBILITY FOR WHAT THEY REALLY DID AND HOW THEY DID IT AND THE SPECIFICS OF WHAT THEY DID.

THEY ARE NOT BEING PUNISHED BY THE COURT FOR GOING TO TRIAL. THAT'S THEIR RIGHT UNDER THE CONSTITUTION. I SEE THAT RIGHT EXERCISED REGULARLY, AND I EXERCISED IT MANY TIMES ON BEHALF OF MY CLIENTS WHEN I WAS PRACTICING LAW AS DO MANY LAWYERS SIMPLY FOR THE REASON THAT IT IS RIPE UNDER THE CONSTITUTION, AND IF A CITIZEN DESIRES IT, HE OR SHE IS ENTITLED TO IT, BUT HERE THERE WAS NO ACCEPTANCE OF RESPONSIBILITY, AND THERE'S NOT YET BEEN AS OF TODAY EVEN. SO THE COURT DOES NOT GRANT EITHER OF THESE DEFENDANTS CREDIT FOR ACCEPTANCE OF RESPONSIBILITY.

THE COURT HAS REVIEWED THE CASES YOU, GENTLEMEN, SUBMITTED ON WHAT IT BELIEVES ARE APPLICABLE AUTHORITIES CONCERNING THE ENHANCEMENT PROVISIONS, AND THE COURT CONCLUDES THAT THE REASONING AND LOGIC OF THE ELEVENTH CIRCUIT IN THE UNPUBLISHED OPINION SUBMITTED BY MR. TRAYNOR KNOWN AS THE CLARET DECISION IS LOGICAL AND IS A CORRECT INTERPRETATION OF THE STATUTE AT ISSUE.

IT HAS TO DO WITH A SENTENCING PROVISION AND A SENTENCING ENHANCEMENT AND DOES NOT REQUIRE A SPECIFIC INTENT TO DISCHARGE A FIREARM BEFORE THE TEN-POINT ENHANCEMENT IS APPROPRIATE, AND THE COURT BELIEVES PREVIOUS ELEVENTH CIRCUIT AUTHORITY SUPPORTS THE COURT'S VIEW THAT THE CLARET DECISION IS

CORRECT, AND THE COURT WILL ENHANCE THE SENTENCES AS TO EACH OF THESE DEFENDANTS TEN POINTS FOR THE FIRING -- FOR THE DISCHARGE OF A FIREARM DURING THIS ARMED ROBBERY.

THE COURT IN MR. LOPEZ' CASE CONCLUDES THAT THESE CASES ARE NOT RELATED, THAT IS THE CASES FOR WHICH THE DEFENDANT WAS SENTENCED IN JUVENILE COURT SOME YEARS AGO. THEY ALL WERE SEPARATE ARMED ROBBERIES. THEY WERE NOT A SERIES OF DRUG TRANSACTIONS OR EMBEZZLEMENT TRANSACTIONS OR SHOPLIFTING TYPE INFRACTIONS OF THE LAW THAT OCCUR. THESE WERE EACH CRIMES OF VIOLENCE AND INDEPENDENT ARMED ROBBERIES DONE BY THIS PERSON AS A JUVENILE.

THE CASES WERE ALL SENT OVER TO ONE COURT AND ONE JUDGE HANDLED THEM, BUT THEY ALL MAINTAIN THEIR IDENTITY, EACH CASE DID, FOR THE PURPOSES OF THE RECORD, AND EACH CASE WAS INDEPENDENTLY ADJUDICATED. SO THE COURT CONCLUDES THAT THEY ARE NOT RELATED.

THE COURT FURTHER FINDS THAT IF THEY ARE RELATED AND THE COURT IS WRONG IN ITS CONCLUSION THAT THEY ARE RELATED, THEN THE PROPER GUIDELINE FOR CONSIDERATION IS SECTION 4A1.1F, AND I WOULD POINT OUT THAT THESE CRIMES ARE CRIMES OF VIOLENCE, AND THEY DID NOT OCCUR ON THE SAME OCCASION.

IF THEY ARE NOT CONSIDERED RELATED TO EACH OTHER PURSUANT TO EITHER SUBSECTION A, B OR C OF GUIDELINE SECTION 4A1.1, THEN THE PROPER COMPUTATION FOR THE OFFENSE IN PARAGRAPH 53, I BELIEVE, WOULD BE TWO POINTS. THE NEXT TWO PARAGRAPHS

WOULD ONE POINT EACH WHICH WOULD CHANGE THE TOTAL COMPUTATION BY TWO POINTS AND WOULD CHANGE THE DEFENDANT'S CRIMINAL HISTORY CATEGORY FROM A FOUR TO A THREE.

I HAVE NOT DETERMINED AND DO NOT DETERMINE AT THIS POINT THAT THAT IS THE APPROPRIATE GUIDELINE SECTION IN THIS CASE SINCE THE COURT HAS FOUND BASED ON THE DOCUMENTS BEFORE IT THAT THESE CASES ARE NOT RELATED CASES. SO THE COURT OVERRULES THE OBJECTION BY MR. JONES TO THOSE CONCLUSIONS OF THE PROBATION OFFICER.

THE COURT HAS SPOKEN TO MR. FORSTER'S OBJECTIONS ON BEHALF OF MR. DEAN TO THE ACTIONS OF THE PROBATION OFFICER IN DENYING A MITIGATING ROLE IN THE PRESENTENCE REPORT TO MR. DEAN A FINDING THAT HE OBSTRUCTED JUSTICE, THE DENIAL OF THE GRANTING OF ACCEPTANCE OF RESPONSIBILITY. I HAVE SPOKEN TO THE ISSUE OF THE MINIMUM SENTENCE REQUIRED.

THE CRIMINAL HISTORY COMPUTATIONS I BELIEVE ARE AT NO ISSUE AT THIS POINT, SO I'LL DENY THE OBJECTION BECAUSE THEY ARE CORRECTLY COMPUTED, EVEN THOUGH SOME OF THE SENTENCES OCCURRED AFTER THE DATE OF THIS OCCURRENCE FOR WHICH THE DEFENDANT IS BEFORE THE COURT TODAY. THE COURT FINDS THAT THE CRIMINAL HISTORY CATEGORY WAS PROPERLY CALCULATED.

NOW, THERE'S A CLAIM OF OVERREPRESENTATION OF THE CRIMINAL HISTORY. THE COURT NOTES THAT IN THE DEVELOPMENT OF CRIMINAL HISTORY CATEGORIES UNDER THE UNITED STATES SENTENCING GUIDELINES VERY CAREFUL CONSIDERATION APPEARS TO HAVE BEEN

GIVEN WHEN YOU LOOK AT THE STRUCTURE AS TO HOW A CRIMINAL HISTORY CATEGORY IS ULTIMATELY DETERMINED.

WHEN YOU LOOK AT THE STRUCTURE OF THE SENTENCING GUIDELINES AND YOU SEE THAT UNDER CERTAIN CIRCUMSTANCES WHERE A PERSON IS PARTICULARLY VIOLENT, CLEARLY AN INDIVIDUAL WITH NO REGARD FOR THE LAW, THERE IS A METHOD BY WHICH IT IS DETERMINED WHETHER OR NOT HE OR SHE IS A CAREER OFFENDER.

YOU BECOME A CAREER OFFENDER WHEN YOU COMMIT A COUPLE OF CERTAIN TYPE VIOLENT CRIMES AND DRUG CRIMES. THERE IS A -- I BELIEVE THAT PEOPLE WHO SERVE TIME IN THE PENAL INSTITUTION OUGHT TO NOT VIOLATE THE LAW FOR A LITTLE WHILE AFTER THEY GET OUT OR AFTER THEY COMPLETE A SENTENCE.

SO IF WITHIN TWO YEARS AFTER YOU ARE RELEASED FROM CONFINEMENT YOU GET IN TROUBLE AGAIN WITH THE LAW, YOU GET AN ENHANCEMENT. THERE IS NOTHING ILLOGICAL ABOUT THAT. IF YOU'RE ON PROBATION AND YOU GET IN TROUBLE WITH THE LAW AGAIN, YOU GET AN ENHANCEMENT. NO PERSON COULD ARGUE WITH ANY JUSTIFICATION THAT THAT'S NOT APPROPRIATE.

IF YOU ARE IN PRISON AND YOU COMMIT A CRIME WHILE YOU ARE IN PRISON AND YOU GET A SENTENCE FOR A CRIME YOU COMMIT WHILE YOU'RE IN PRISON, NO PERSON COULD JUSTIFIABLY ARGUE THAT THAT SHOULD EXCUSE YOU FROM GETTING AN INCREASE IN YOUR CRIMINAL HISTORY CATEGORY JUST BECAUSE YOU DID IT WHILE YOU WERE IN PRISON.

SO ALL THOSE TYPE OF THINGS EACH HAD -- MOST OF THE

THINGS I MENTIONED EACH HAD A LITTLE BIT TO DO WITH THE DEVELOPMENT OF THIS HIGH CRIMINAL HISTORY CATEGORY THIS DEFENDANT MR. DEAN HAS, PLUS SOME JUST PLAIN OLD CRIMES HE COMMITTED. SO THE COURT FINDS THAT HIS CRIMINAL HISTORY CATEGORY IS NOT OVERREPRESENTED.

THE LAST OBJECTION MR. FORSTER MADE OR POSITION HE TOOK WAS THE STRUCTURE OF THE SENTENCE, AS TO HOW THE COURT SHALL STRUCTURE THE SENTENCE, AND I TAKE THAT AS ARGUMENT AND POSITIONS TAKEN THAT THE COURT OUGHT TO CONSIDER AND WILL CONSIDER WHEN IT HEARS FROM THE DEFENDANT AND HIS LAWYER AT THE ARTICULATION POINT IN THE SENTENCING HEARING.

SO THE COURT DENIES ALL THE OBJECTIONS MADE ON BEHALF OF THE DEFENDANT MR. DEAN TO THE PRESENTENCE REPORT IN HIS CASE AND ADOPTS ALL OF THE FINDINGS OF FACT AND CONCLUSIONS CONTAINED IN THE PRESENTENCE REPORT IN MR. DEAN'S CASE AND MAKES ALL OF THOSE FINDINGS OF FACT AND CONCLUSIONS THOSE OF THE COURT IN ALL RESPECT EXCEPT AS MODIFIED ORALLY IN THE COURT'S FINDINGS AND CONCLUSIONS HERE THIS AFTERNOON.

THE SAME IS TRUE IN MR. LOPEZ' CASE. THE COURT DENIES ALL OF THE OBJECTIONS MADE BY DEFENSE COUNSEL ON BEHALF OF MR. LOPEZ AND ADOPTS ALL OF THE FINDINGS OF FACT AND CONCLUSIONS CONTAINED IN THE PRESENTENCE REPORT AS PREPARED BY THE UNITED STATES PROBATION OFFICER AND MAKES ALL OF THESE FINDINGS OF FACT AND CONCLUSIONS THOSE OF THE COURT IN ALL RESPECTS EXCEPT AS ORALLY MODIFIED BY THE COURT'S FINDINGS AND

CONCLUSIONS AT THIS HEARING THIS AFTERNOON.

SO THE COURT'S SENTENCING OPTIONS ARE AS FOLLOWS, EXCEPT FOR THE ISSUE OF RESTITUTION WHICH I'LL NEED TO HEAR FROM COUNSEL ABOUT:

ON COUNT 1, THE SENTENCING RANGE BY THE STATUTE IS NOT MORE THAN 20 YEARS AND A 250,000 DOLLAR FINE. ON COUNT 2 WOULD BE FIVE YEARS UP TO LIFE IMPRISONMENT AND A 250,000 DOLLAR FINE DEPENDING ON FACTS FOUND BY THE COURT, AND THE COURT HAS FOUND FACTS THAT WILL MEAN A MINIMUM MANDATORY TEN YEARS UP TO LIFE IMPRISONMENT AND A 250,000 DOLLAR FINE. THESE CONCLUSIONS ARE THE SAME IN THE PRESENTENCE REPORT WITH RRFERENCE TO EACH OF THESE DEFENDANTS.

AT THIS POINT THEY BEGIN TO DIFFER. MR. DRAN'S CRIMINAL TOTAL OFFENSE LEVEL IS 24. HIS CRIMINAL HISTORY CATEGORY IS 6. HIS CUSTODY GUIDELINE RANGE ON COUNT 1 IS 100 TO 125 MONTHS AND 10 YEARS CONSECUTIVE ON COUNT 2. THE FINE GUIDELINE RANGE IS 10,000 DOLLARS TO A HUNDRED THOUSAND DOLLARS. THE RESTITUTION WE WILL TALK ABOUT IN A MOMENT. SPECIAL ASSESSMENT OF 200 DOLLARS IS REQUIRED AS A PART OF THE SENTENCE. COST OF CONFINEMENT IS ESTIMATED AT $23,431.92 A YEAR. SUPERVISION IS ESTIMATED AT 3450 DOLLARS A YEAR. PROBATION IS NOT AUTHORIZED. SUPERVISED RELEASR OF TWO TO THREE YEARS IS REQUIRED AS TO EACH SENTENCE IN THIS CASE.

IN MR. LOPEZ' CASE, THE STATUTORY PENALTY IS NOT MORE THAN 20 YEARS AND A 250,000 DOLLAR FINE. COUNT 2 FROM FIVE

YEARS TO LIFE IMPRISONMENT AND A 250,000 DOLLAR FINE. BASED UPON THE CONCLUSIONS THAT THE COURT HAS MADE IN RESPONSE TO OBJECTIONS TO THE PRESENTENCE REPORT, THE MINIMUM MANDATORY WOULD BE 10 YEARS TO LIFE. THE TOTAL OFFENSE LEVEL HERE FOR HIM IS 24. HIS CRIMINAL HISTORY CATEGORY IS 4. CUSTODY GUIDELINE RANGE ON COUNT 1 IS 77 TO 96 MONTHS AND 10 YEARS CONSECUTIVE ON COUNT 2. FINE GUIDELINE RANGE IS 10,000 DOLLARS TO A HUNDRED THOUSAND DOLLARS. RESTITUTION WE WILL HAVE TO SEE ABOUT. A SPECIAL ASSESSMENT OF 200 DOLLARS IS REQUIRED AS A PART OF THE SENTENCE IN THIS CASE. COST OF CONFINEMENT IS ESTIMATED AT $23,431.92. 3450 DOLLARS IS ESTIMATED AS COST OF SUPERVISION. PROBATION IS NOT AN OPTION. SUPERVISED RELEASE OF FROM TWO TO THREE YEARS IS REQUIRED ON EACH COUNT.

WHAT'S THE GOVERNMENT'S POSITION ON RESTITUTION? THE COURT HAS RECEIVED NOTHING ON RESTITUTION EXCEPT THE BANK'S CLAIM, I BELIEVE, FOR 2605 DOLLARS.

MR. TRAYNOR: THAT WOULD BE IT, YOUR HONOR. ABOUT 3600 DOLLARS WAS TAKEN IN THE ROBBERY. THEY GOT A THOUSAND THIRTY-SEVEN OUT OF MR. LOPEZ' PANTS POCKET WHICH LEAVES THE 2600 DOLLARS. THE BANK HAD TO DO A FEW REPAIRS BUT NOTHING SUBSTANTIAL. SO OUR POSITION WOULD BE THAT THEY WOULD BE JOINT AND SEVERALLY LIABLE FOR THE 2600 DOLLARS.

THE COURT: DO YOU, GENTLEMEN, TAKE ANY ISSUE WITH THAT?

MR. FORSTER: YOUR HONOR, THAT IS WHAT THE EVIDENCE

SHOWED. THEY DID RECOVER SOME PORTION OF IT. THAT RESTITUTION AMOUNT IS STRICTLY THE MONETARY LOSS. THAT'S WHAT THE EVIDENCE SHOWED.

THE COURT: ALL RIGHT.

MR. JONES: I CONCUR WITH MR. FORSTER, 2600 DOLLARS WOULD BE THE FAIR --

THE COURT: WELL, THERE WAS SOME ISSUE OR CONCERN ABOUT JACKS AUTO SALE. THE COURT HAS NOT BEEN PROVIDED ANY DOCUMENTATION. THERE'S BEEN NO RESPONSE TO THE PROBATION OFFICE REQUEST FOR DOCUMENTATION. SO THE COURT CONCLUDES AS TO THE ISSUE OF RESTITUTION FOR JACKS AUTO SALES, THERE IS NOTHING BEFORE THE COURT THAT IT CAN UTILIZE TO MAKE A DETERMINATION ON THAT ISSUE AND WILL NOT FURTHER CONCERN ITSELF WITH THAT PART OF THE CASE.

YOU WANT TO COME AROUND WITH MR. LOPEZ AND LET ME HEAR FROM YOU, MR. JONES, AND FROM HIM AS TO WHAT COURT OUGHT TO DO?

MR. JONES: YOUR HONOR, SPEAKING ON BEHALF OF MR. LOPEZ, WE'D LIKE TO -- FIRST, HE'S BEEN IN CUSTODY SINCE NOVEMBER 10TH, 2004. WE'D FIRST ASK THAT WHATEVER SENTENCE YOU DO IMPOSE THAT YOU GIVE HIM CREDIT FOR THE TIME THAT HE HAS BEEN INCARCERATED. HE WAS DENIED BOND OR BAIL OR ANYTHING OF THAT NATURE. SO HE HAS BEEN IN CUSTODY SINCE NOVEMBER 10TH OF 2004.

SECOND ISSUE THAT I WOULD ASK THAT THE COURT TO RULE

UPON OR TO ORDER IS THAT HE BE ENTITLED TO THE DRUG TREATMENT PROGRAMS THAT ARE AFFORDED TO HIM BY THE BUREAU OF PRISONS FOR THE MERE FACT THAT I BELIEVE HIS -- NOT ONLY HIS PRESENTENCE REPORT AND HIS FINAL PRESENTENCE SCREAM OUT THAT HE NEEDS CONTROLLED SUBSTANCE HELP.

HE SEEMS TO BE INCREDIBLY DEPENDENT UPON MAINLY MARIJUANA WHICH MAY HAVE BEEN THE UNDERLYING REASON FOR THE PROBLEMS THAT THEY'RE IN TODAY. I WOULD ASK THAT THAT BE GIVEN GIVING HIM THE OPPORTUNITY TO SEEK THAT TREATMENT WHILE IN THE FACILITY AND TO HOPEFULLY COMPLETE IT AND MOST IMPORTANTLY JUST BE ENTITLED TO RECEIVE THAT NEEDED TREATMENT.

ALSO I WOULD ASK THAT AT THIS PRESENT STAGE BASED UPON THE FINDINGS OF THIS HONORABLE COURT THAT YOU WOULD SENTENCE HIM TO THE LOW END OF THE GUIDELINE RANGE. HE WILL BE LOOKING AT I THINK ON THE LOW END, IF MY MATH SERVES ME CORRECTLY, I THINK 197 MONTHS WHICH WOULD BE A MORE THAN FAIR SENTENCE UNDER THE FACTS, UNDER THE CIRCUMSTANCES, UNDER THE SITUATIONS THAT THIS CASE PRESENTS ITSELF.

I'LL LET MR. LOPEZ FOLLOW UP ANY CONCLUDING REMARKS THAT I --

THE COURT: YES, I'D LIKE TO HEAR WHAT YOU HAVE TO SAY, MR. LOPEZ, BEFORE SENTENCE IS IMPOSED.

DEFENDANT LOPEZ: YOUR HONOR, I CAN'T MAKE AN EXCUSE FOR WHAT HAPPENED. I MEAN WE COULD -- I COULD SAY IT WAS DRUGS, I COULD SAY IT WAS THE DEBT, I COULD SAY IT WAS PLENTY

OF THINGS. THERE'S NO EXCUSE FOR IT, AND I'M JUST GLAD THAT NOBODY WAS PHYSICALLY HURT IN WHAT TOOK PLACE.

I JUST ASK THE COURT -- I CAN'T EVEN ASK THE COURT TO BE LENIENT. WITH MY RECORD AND WHAT HAPPENED, I CAN'T ASK THE COURT TO BE LENIENT. ALL I'D JUST LIKE TO SAY IS I'M JUST GLAD NOBODY WAS HURT. THAT'S IT.

THE COURT: THANK YOU VERY MUCH. MR. TRAYNOR.

MR. TRAYNOR: YOUR HONOR, GIVEN THE MINIMUM MANDATORY SENTENCE IN THIS CASE, WE'RE GOING TO AGREE TO A LOW END SENTENCE ON COUNT 1.

THE COURT: PURSUANT TO THE SENTENCING REFORM ACT OF 1984, IT'S THE JUDGMENT OF THE COURT THAT THE DEFENDANT RICARDO CURTIS LOPEZ BE AND IS HEREBY COMMITTED TO THE CUSTODY OF THE BUREAU OF PRISONS TO BE IMPRISONED FOR A TERM OF 78 MONTHS ON COUNT 1 AND A TERM OF 120 MONTHS ON COUNT 2 WITH COUNT 2 TO BE SERVED CONSECUTIVE TO THE TERM IMPOSED ON COUNT 1 FOR A TOTAL SENTENCE OF 198 MONTHS.

IT IS FURTHER ORDERED THAT THE DEFENDANT SHALL PAY TO THE UNITED STATES A MANDATORY SPECIAL ASSESSMENT OF 200 DOLLARS WHICH SHALL BE DUE IMMEDIATELY.

IT IS FURTHER ORDERED THAT THE DEFENDANT SHALL MAKE RESTITUTION JOINTLY AND SEVERALLY WITH THE CODEFENDANT IN THIS CASE TO THE FOLLOWING PERSONS IN THE FOLLOWING AMOUNT TO AMSOUTH BANK IN THE AMOUNT OF 2605 DOLLARS.

THE COURT HAS NOT ORDERED RESTITUTION AS TO JACK'S

AUTO SALES FOR THR REASONS PREVIOUSLY SET FORTH IN THE RECORD.

THE DEFENDANT SHALL NOTIFY THE UNITED STATES ATTORNEY FOR THIS DISTRICT WITHIN 30 DAYS OF ANY CHANGE OF MAILING OR RESIDENCE ADDRESS THAT OCCURS WHILE ANY PORTION OF THE RESTITUTION REMAINS UNPAID.

THE COURT FINDS THE DEFENDANT DOES NOT HAVE THE ABILITY TO PAY A FINE AND THE COST OF INCARCERATION. THE COURT WILL WAIVE A FINE AND THE COST OF INCARCERATION IN THIS CASE.

UPON RELEASE FROM IMPRISONMENT, THE DEFENDANT SHALL BE PLACED ON SUPERVISED RELEASE FOR A TERM OF THREE YEARS. THIS TERM CONSISTS OF THREE YEARS ON COUNT 1 AND A TERM OF THREE YEARS ON COUNT 2. BOTH OF THESE TERMS TO RUN CONCURRENTLY.

WITHIN 72 HOURS OF RELEASE FROM THE CUSTODY OF THE BUREAU OF PRISONS, THE DEFENDANT SHALL REPORT IN PERSON TO THE UNITED STATES PROBATION OFFICE IN THE DISTRICT TO WHICH THE DEFENDANT IS RELEASED.

WHILE ON SUPERVISED RELEASE, THE DEFENDANT SHALL NOT COMMIT ANOTHER FEDERAL, STATE OR LOCAL CRIME; SHALL COMPLY WITH THE STANDARD CONDITIONS THAT HAVE BEEN ADOPTED BY THIS COURT AND SHALL COMPLY WITH THE FOLLOWING ADDITIONAL CONDITIONS:

THE DEFENDANT SHALL SUBMIT TO ONE DRUG URINALYSIS WITHIN 15 DAYS AFTER BEING PLACED ON SUPERVISION, AND AT LEAST TWO PERIODIC TESTS THEREAFTER.

THE DEFENDANT SHALL PARTICIPATE IN A DRUG/ALCOHOL

TREATMENT PROGRAM UNDER THE GUIDANCE AND SUPERVISION OF THE UNITED STATES PROBATION OFFICER, AND IF ABLE CONTRIBUTE TO THE COST OF SERVICES FOR SUCH TREATMENT.

THE DEFENDANT SHALL MAKE A FULL AND COMPLETE DISCLOSURE OF FINANCES AND SUBMIT TO AN AUDIT OF HIS FINANCIAL DOCUMENTS AT THE REQUEST OF THE UNITED STATES PROBATION OFFICER.

THE DEFENDANT SHALL PAY ANY FINANCIAL PENALTY THAT'S IMPOSED BY THIS JUDGMENT AND THAT REMAINS UNPAID AT THE COMMENCEMENT OF THE TERM OF SUPERVISED RELEASE AT A RATE ESTABLISHED BY THE UNITED STATES PROBATION OFFICER IN ACCORDANCE WITH THE COURT-APPROVED PAYMENT SCHEDULE BUT AT NO LESS THAN 200 DOLLARS A MONTH.

THE DEPENDANT SHALL NOT INCUR NEW CREDIT CHARGES OR OPEN ADDITIONAL LINES OF CREDIT WITHOUT THE APPROVAL OF THE UNITED STATES PROBATION OFFICER UNLESS THE DEFENDANT IS IN COMPLIANCE WITH HIS PAYMENT SCHEDULE.

THE DEFENDANT SHALL NOT OWN, POSSESS OR HAVE UNDER HIS CONTROL ANY FIREARM, DANGEROUS WEAPON OR OTHER DESTRUCTIVE DEVICE.

THE DEFENDANT SHALL SUBMIT TO A SEARCH OF HIS PERSON AND PROPERTY, BOTH REAL AND PERSONAL, RESIDENCE, OFFICE, MOTOR VEHICLE AT REASONABLE TIMES IN A REASONABLE MANNER BASED UPON REASONABLE SUSPICION OF CONTRABAND OR EVIDENCE OF A CONDITION -- OF A VIOLATION OF A CONDITION OF RELEASE, AND

FAILURE TO SUBMIT TO SUCH SEARCH MAY BE GROUNDS FOR REVOCATION, AND THE DEFENDANT SHALL INFORM ANY OTHER RESIDENTS OF THE PREMISES THAT IT MAY BE SUBJECT TO SEIZURES AND SEARCHES SUBJECT TO THIS CONDITION.

PURSUANT TO THE LAW REQUIRING MANDATORY DNA TESTING FOR FEDERAL OFFENDERS CONVICTED OF FELONY OFFENSES, THE DEFENDANT SHALL COOPERATE IN THE COLLECTION OF A DNA SAMPLE AS DIRECTED BY THE PROBATION OFFICER.

ON COUNT 2 I INITIALLY THOUGHT THE SUPERVISED RELEASE TERM WAS UP TO THREE YEARS, IT'S UP TO FIVE YEARS. SO THE COURT VACATES ITS ORDER AS TO THE TERM OF SUPERVISED RELEASE FOR COUNT 2 FOR THREE YEARS AND IMPOSES A TERM OF FIVE YEARS SUPERVISED RELEASE WITH THAT TERM TO RUN CONCURRENT WITH THE TERM OF SUPERVISED RELEASE OF THREE YEARS IMPOSED ON COUNT 1.

THE COURT HAS IMPOSED THE SENTENCE THAT IT HAS IN THIS CASE BECAUSE IT'S APPROPRIATE UNDER THE LAW. IT'S APPROPRIATE UNDER THE UNITED STATES SENTENCING GUIDELINES, AND IT'S APPROPRIATE UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE.

THE COURT IN REVIEWING THE UNITED STATES SENTENCING GUIDELINES, HEARING THE POSITION OF DEFENSE COUNSEL, HEARING THE STATEMENT OF THE DEFENDANT HIMSELF CONCLUDED THAT IT WAS APPROPRIATE THAT THE COURT SENTENCE THIS DEFENDANT AT THE BOTTOM AREA, BOTTOM PORTION OF THE GUIDELINE RANGE WHICH THE COURT HAS DETERMINED WAS APPROPRIATE UNDER THE CIRCUMSTANCES OF

THIS CASE AND UNDER THE UNITED STATES SENTENCING GUIDELINES.

THE COURT IN CONSIDERING THE UNITED STATES SENTENCING GUIDELINES IN THIS CASE DISCUSSED WITH COUNSEL THE PROVISIONS AND ITS CONCLUSIONS AS TO WHAT WOULD BE AN APPROPRIATE DETERMINATION OF THE DEFENDANT'S CRIMINAL HISTORY CATEGORY IF THE COURT WAS INCORRECT IN ITS VIEW OF RELATED OFFENSES AND IF IT SHOULD HAVE RULED OTHERWISE, THE CRIMINAL HISTORY CATEGORY WOULD HAVE BEEN DIFFERENT. IT WOULD HAVE BEEN THREE INSTEAD OF FOUR.

HAD HIS CRIMINAL HISTORY CATEGORY BEEN DETERMINED BY THIS COURT TO BE THREE, THE COURT STILL WOULD HAVE SENTENCED THIS DEFENDANT AT A LEVEL 28 ON COUNT 1.

THE COURT MADE THE DETERMINATION THAT THE APPROPRIATE LEVEL WAS LEVEL 4 AND SENTENCED THE DEFENDANT AT THE BOTTOM OF THAT GUIDELINE RANGE, AND HAD I DETERMINED IT TO BE A LEVEL 3, I WOULD HAVE SENTENCED HIM AT THE TOP OF THE GUIDELINE RANGE, AND NOT PAR OF YOUR REQUEST ON BEHALF OF YOUR CLIENT, MR. JONES, OR THE GOVERNMENT'S RECOMMENDATION.

ALSO, THE COURT IN DETERMINING WHAT'S AN APPROPRIATE SENTENCE IN THIS CASE ULTIMATELY HAS IMPOSED A SENTENCE REGARDLESS OF ANY MISCALCULATION OR IMPROPER DETERMINATION OF ANY GUIDELINE LEVEL OR ANY GUIDELINE DETERMINATION, THE COURT HAS IMPOSED A SENTENCE THAT IT THINKS IS RIGHT AND FAIR AND PROPER RECOGNIZING THAT THE UNITED STATES SENTENCING GUIDELINES ARE ADVISORY BUT HIGHLY ADVISORY, AND THE COURT HAS IMPOSED A

SENTENCE IN THIS CASE THAT MEETS THE MANDATORY REQUIREMENTS OF THE LAW WITH REFERENCE TO THE SENTENCING REQUIREMENTS WITH REPERENCE TO COUNT 2 IN THIS INDICTMENT, AND THE OVERALL SENTENCE IN THIS CASE IS IMPOSED FOR THE PURPOSE OF AND DOES CONSIDER THE NATURE AND CIRCUMSTANCES OF THE OFFENSE AND THE HISTORY AND CHARACTERISTICS OF THE DEPENDANT IN THIS CASE.

THE SENTENCE IMPOSED IS INTENDED TO REFLECT THE SERIOUSNESS OF THE OFFENSE, TO PROMOTE RESPECT FOR THE LAW AND PROVIDE JUST PUNISHMENT FOR THE OFFENSE.

IT IS ALSO DONE TO AVOID -- TO PROVIDE ADEQUATE DETERRENCE TO CRIMINAL CONDUCT AND TO PROTECT THE PUBLIC FROM FURTHER CRIMES OF THIS DEPENDANT.

NOW WHILE THE COURT DOES NOT BELIEVE YOUR CLIENT WILL BE ENTITLED TO OR ABLE TO PARTICIPATE IN THE BUREAU OF PRISONS 500 HOUR ALCOHOL AND DRUG PROGRAM BECAUSE OF THE USE OF A GUN IN CONNECTION WITH THIS OFFENSE, I'LL STILL GRANT YOUR RECOMMENDATION AND REQUEST, AND THE COURT RECOMMENDS THAT HE BE ALLOWED TO PARTICIPATE IN THE FEDERAL BUREAU OF PRISONS INTENSIVE DRUG AND ALCOHOL TREATMENT PROGRAM.

MR. LOPEZ, YOU HAVE A RIGHT TO APPEAL TO A HIGHER COURT FROM EVERYTHING THE COURT HAS DONE IN THE CASE ALMOST. IF YOU DO WANT TO APPEAL TO A HIGHER COURT, YOU HAVE TO DO SO WITHIN TEN DAYS FROM TODAY OR YOU FOREVER LOSE YOUR RIGHT TO APPEAL TO A HIGHER COURT.

IF YOU DO WANT TO APPEAL TO A HIGHER COURT AND YOU

DON'T HAVE THE MONEY TO HIRE A LAWYER TO HANDLE YOUR CASE ON APPEAL, THE COURT WILL APPOINT COUNSEL TO REPRESENT YOU ON APPEAL, AND YOU CAN APPEAL TO A HIGHER COURT WITHOUT ANY COST WHATSOEVER TO YOURSELF.

DO YOU WANT TO PUT ANY EXCEPTIONS IN THE RECORD, MR. JONES?

MR. JONES: CAN I RESERVE THOSE?

THE COURT: NO, YOU HAVE TO PUT THEM IN HERE.

YOU CAN OBJECT TO EVERY RULING I'VE MADE OF THE GUIDELINES WITH REFERENCE TO YOUR CLIENT IF YOU WANT TO, BUT YOU DO HAVE TO PUT THEM IN THE RECORD.

MR. JONES: SIR, I WOULD OBJECT TO YOUR RULING AS TO, FIRST OF ALL, THE OBSTRUCTION OF JUSTICE. I WOULD ALSO OBJECT TO THE FINDINGS OF THE MINIMUM SENTENCE OF 10 YEARS INSTEAD OF 7. I WOULD ALSO OBJECT TO CONSIDERING THE JUVENILE OFFENSES FROM NEWTON COUNTY AS UNRELATED FOR PURPOSES OF MR. LOPEZ' APPEAL RIGHTS.

THE COURT: ALL RIGHT. MR. TRAYNOR.

MR. TRAYNOR: NO OBJECTIONS, YOUR HONOR.

THE COURT: THANK YOU VERY MUCH FOR HANDLING THIS CASE, MR. JONES.

MR. JONES: IT'S BEEN MY PLEASURE, SIR.

THE COURT: MR. FORSTER, IF YOU'D COME AROUND WITH YOUR CLIENT.

ANYTHING YOU WANT TO SAY BEFORE SENTENCE IS IMPOSED

IN HIS CASE?

MR. FORSTER: YOUR HONOR, I WOULD CONTINUE TO OBJECT TO THE RULINGS WITH REGARDS TO OBSTRUCTION, BUT YOU'LL ASK ME THAT IN A MINUTE, BUT GIVEN THAT THE RULINGS THAT THE COURT HAS MADE, THE GUIDELINE WOULD BE A HUNDRED TO 125 WITH A 120 THEN CONSECUTIVE, WE WOULD ASK FOR THE MINIMUM GUIDELINE SENTENCE GIVEN THE COURT'S RULINGS.

WE WOULD ASK FOR HIM -- THE PSR INDICATES THAT HE HAS BEEN IN FEDERAL CUSTODY SINCE NOVEMBER 10TH OF 04. WE WOULD ASK FOR THE COURT TO GRANT HIM CREDIT FOR ALL OF THAT TIME THAT HE HAS SERVED.

I ASKED IN MY PLEADINGS FOR A CONCURRENT SENTENCE WITH REGARDS TO COUNT 1 AND HIS STATE CHARGE. I THINK THAT WOULD BE ACCOMPLISHED -- I WOULD ASK FOR IT SPECIFICALLY, BUT I BELIEVE THAT WOULD STILL BE ACCOMPLISHED IF THE COURT GIVES HIM CREDIT FOR THE ENTIRETY OF HIS TIME IN FEDERAL CUSTODY.

HE IS SERVING A STATE SENTENCE NOW THAT HE HAS BEEN IN THE CUSTODY OF THIS COURT, AND WE WOULD ASK FOR HIS TIME TO COUNT FROM NOVEMBER OF 04 THROUGH TODAY AND THEN COUNT 1 TO RUN CONCURRENT WITH THAT SPLIT STATE SENTENCE, AND THEN, AGAIN, I WOULD REASSERT THE OBJECTIONS THAT I MADE AND THAT I HAVE ARGUED TO THIS POINT.

THE COURT: ANYTHING YOU WANT TO SAY, MR. DEAN?

DEFENDANT DEAN: YES, SIR, FIRST OFF I WOULD LIKE TO APOLOGIZE TO THE COURT FOR MY ACTIONS AND CAUSING PROBLEMS. I

WOULD LIKE TO ASK YOU TO TAKE INTO CONSIDERATIONS MY REQUEST OF MY TIME THAT I'VE ALREADY DONE AND EVERYTHING, SIR.

THE COURT: MR. TRAYNOR.

MR. TRAYNOR: YOUR HONOR, I'M LOOKING FOR THE STATUTE. I BELIEVE THE BUREAU OF PRISONS -- OUR POSITION WOULD BE THAT MR. DEAN CAME INTO STATE CUSTODY IN NOVEMBER 04, AND HE HAS BEEN WRITTED HERE, AND SO EVERY DAY HE'S HERE HE'S GETTING CREDIT AGAINST HIS STATE SENTENCE.

SO THE BUREAU OF PRISONS WILL SAY -- AND I CAN FIND THE STATUTE IN A MINUTE -- THAT THEY CANNOT GIVE HIM CREDIT BACK TO NOVEMBER 04 IN THIS SENTENCE BECAUSE HE'S ALREADY GETTING IT IN HIS STATE SENTENCE. SO I CAN'T CONCUR WITH COUNSEL'S RECOMMENDATION ON THAT.

AGAIN, IN LIGHT OF THE HIGH MINIMUM MANDATORY, WE AGREE THAT A LOW END SENTENCE IS APPROPRIATE IN THIS CASE, BUT FOR THE REASONS I STATED BEFORE, I CANNOT AGREE THAT THE COUNT 1 SENTENCE SHOULD BE CONCURRENT. WE THINK THE WHOLE FEDERAL SENTENCE SHOULD BE CONSECUTIVE TO THE SENTENCE HE'S NOW SERVING.

THE PROBATION OFFICER: YOUR HONOR, THE DEFENDANT WAS ARRESTED ON NOVEMBER 10TH, 2004. HE WAS ARRESTED ON STATE CHARGES RELATING TO THE INSTANT OFFENSE. IT'S MY UNDERSTANDING THAT HE CAME TO FEDERAL CUSTODY PURSUANT TO A WRIT. THE UNDERLYING STATE CHARGES WERE DISMISSED OR DEAD DOCKETED DECEMBER 13TH 2005.

WHENEVER THE BOP GETS THE INFORMATION AND HAS THE MARSHALS' INFORMATION, THEY WILL APPLY THE CORRECT DATE DEPENDING ON HOW YOUR HONOR RULES ON WHETHER IT'S CONCURRENT VERSUS CONSECUTIVE.

WHENEVER HE WAS IN STATE CUSTODY APPEARING FOR THE STATE CHARGES, THEY WILL PROBABLY RULE THAT A STATE DAY RATHER THAN A FEDERAL DAY.

THE COURT: ALL RIGHT. ANYTHING MORE?

MR. FORSTER: NO, SIR.

THE COURT: PURSUANT TO THE SENTENCING REFORM ACT OF 1984, IT'S THE JUDGMENT OF THE COURT THAT THE DEFENDANT CHRISTOPHER MICHAEL DEAN BE AND IS HEREBY COMMITTED TO THE CUSTODY OF THE BUREAU OF PRISONS TO BE IMPRISONED FOR A TERM OF 100 MONTHS ON COUNT 1 AND A TERM OF 120 MONTHS ON COUNT 2 WITH THE SENTENCE ON COUNT 2 TO RUN CONSECUTIVE TO THE TERM IMPOSED ON COUNT 1 IN THIS COURT TO THE EXTENT NECESSARY TO PRODUCE A TOTAL TERM OF 220 MONTHS.

THIS SENTENCE SHALL ALSO RUN CONSECUTIVE, THAT IS, HIS TOTAL SENTENCE SHALL ALSO RUN CONSECUTIVE TO THE SENTENCE IMPOSED IN FLOYD SUPERIOR COURT IN CASE NUMBER 05-CR-28516-JFL-002.

IT IS FURTHER ORDERED THE DEFENDANT SHALL PAY TO THE UNITED STATES A MANDATORY SPECIAL ASSESSMENT OF 200 DOLLARS WHICH SHALL BE DUE IMMEDIATELY.

IT IS FURTHER ORDERED THAT THE DEFENDANT SHALL MAKE

RESTITUTION JOINTLY AND SEVERALLY WITH HIS CODEFENDANT IN THIS CASE TO THE FOLLOWING ENTITY IN THE FOLLOWING AMOUNT AMSOUTH BANK, 2605 DOLLARS.

FOR THE REASONS STATED HERETOFORE IN THIS SENTENCING HEARING, THE COURT IN THIS CASE HAS NOT IMPOSED A RESTITUTION REQUIREMENT TO JACK'S AUTO SALES.

THE DEFENDANT SHALL NOTIFY THE UNITED STATES ATTORNEY FOR THIS DISTRICT WITHIN 30 DAYS OF ANY CHANGE OF MAILING OR RESIDENCE ADDRESS THAT OCCURS WHILE ANY PORTION OF THE RESTITUTION REMAINS UNDERPAID.

THE COURT FINDS THE DEFENDANT DOES NOT HAVE THE ABILITY TO PAY A FINE AND THE COST OF INCARCERATION AND THE COURT WILL WAIVE A FINE AND THE COST OF INCARCERATION IN THIS CASE.

UPON RELEASE FROM IMPRISONMENT, THE DEFENDANT SHALL BE PLACED ON SUPERVISED RELEASE FOR A TERM OF FIVE YEARS ON COUNT 2 AND A TERM OF THREE YEARS ON COUNT 1 WITH THOSE TERMS TO RUN CONCURRENTLY.

WITHIN 72 HOURS OF RELEASE FROM THE CUSTODY OF THE BUREAU OF PRISONS, THE DEFENDANT SHALL REPORT IN PERSON TO THE UNITED STATES PROBATION OFFICE IN THE DISTRICT TO WHICH THE DEFENDANT IS RELEASED.

WHILE ON SUPERVISED RELEASE, THE DEFENDANT SHALL NOT COMMIT ANOTHER FEDERAL, STATE OR LOCAL CRIME; SHALL COMPLY WITH THE STANDARD CONDITIONS THAT HAVE BEEN ADOPTED BY THIS COURT

AND SHALL COMPLY WITH THE FOLLOWING ADDITIONAL CONDITIONS:

THE DEFENDANT SHALL SUBMIT TO ONE DRUG URINALYSIS WITHIN 15 DAYS AFTER BEING PLACED ON SUPERVISION AND AT LEAST TWO PERIODIC TESTS THEREAFTER.

THE DEFENDANT SHALL PARTICIPATE IN A DRUG/ALCOHOL TREATMENT PROGRAM UNDER THE GUIDANCE AND SUPERVISION OF THE UNITED STATES PROBATION OFFICER, AND IF ABLE CONTRIBUTE TO THE COST OF SERVICES FOR SUCH TREATMENT.

THE DEFENDANT SHALL MAKE A FULL AND COMPLETE DISCLOSURE OF FINANCES, SUBMIT TO AN AUDIT OF FINANCIAL DOCUMENTS AT THE REQUEST OF THE UNITED STATES PROBATION OFFICER.

THE DEFENDANT SHALL PAY ANY FINANCIAL PENALTY THAT'S IMPOSED BY THIS JUDGMENT AND THAT REMAINS UNPAID AT THE COMMENCEMENT OF THE TERM OF SUPERVISED RELEASE AT A RATE ESTABLISHED BY THE UNITED STATES PROBATION OFFICER IN ACCORDANCE WITH THE APPROVED PAYMENT SCHEDULE BUT IN AN AMOUNT NOT LESS THAN 200 DOLLARS MONTHLY.

THE DEFENDANT SHALL NOT INCUR NEW CREDIT CHARGES OR OPEN ADDITIONAL LINES OF CREDIT WITHOUT THE APPROVAL OF THE UNITED STATES PROBATION OFFICER, AND THE DEFENDANT IS IN COMPLIANCE WITH THE PAYMENT SCHEDULE.

THE DEFENDANT SHALL NOT OWN, POSSESS, HAVE UNDER HIS CONTROL ANY FIREARM, DANGEROUS WEAPON OR OTHER DESTRUCTIVE DEVICE.

THE DEFENDANT SHALL SUBMIT TO A SEARCH OF HIS PERSON, PROPERTY, BOTH REAL AND PERSONAL, RESIDENCE, OFFICE, VEHICLE AT A REASONABLE TIME IN A REASONABLE MANNER BASED UPON REASONABLE SUSPICION OF CONTRABAND OR EVIDENCE OF A VIOLATION OF A CONDITION OF RELEASE.

FAILURE TO SUBMIT TO SUCH A SEARCH MAY BE GROUNDS FOR REVOCATION, AND THE DEFENDANT SHALL INFORM ANY OTHER RESIDENTS OF THE PREMISES THAT IT IS SUBJECT TO THIS CONDITION.

PURSUANT TO THE LAWS WHICH PROVIDE FOR MANDATORY DNA TESTING FOR FEDERAL OFFENDERS CONVICTED OF CERTAIN FELONY OFFENSES, THE DEFENDANT IS REQUIRED AND ORDERED TO COOPERATE IN THE COLLECTION OF A DNA SAMPLE AS DIRECTED BY THE UNITED STATES PROBATION OFFICER.

THE COURT HAS IMPOSED THE SENTENCE THAT IT HAS IN THIS CASE FOR SEVERAL REASONS. FIRST, IT COMPLIES WITH THE LAW. IT COMPLIES WITH THE PROVISIONS OF THE UNITED STATES SENTENCING GUIDELINES WHICH THE COURT RECOGNIZES ARE ADVISORY BUT HIGHLY ADVISORY.

IT COMPLIES WITH THE SENTENCING REQUIREMENTS AS TO COUNT 2. IT COMPLIES WITH THE PROVISIONS OF THE UNITED STATES SENTENCING GUIDELINES ALSO AS STATED AND FOUND TO BE APPROPRIATE WITH REFERENCE TO COUNT 1 OF THIS INDICTMENT.

THE COURT ULTIMATELY HAS ENDEAVORED TO IMPOSE A SENTENCE IN THIS CASE THAT DOES COMPLY WITH THE SPIRIT AND WORDING OF THE UNITED STATES SENTENCING GUIDELINES, BUT

ULTIMATELY IN DETERMINING WHAT SENTENCE IT SHALL IMPOSE IN THIS CASE, THE COURT HAS CONSIDERED AND UTILIZES THE MANDATE OF THE CONGRESS OF THE UNITED STATES WHICH SAYS:

IN DETERMINING WHAT IS AN APPROPRIATE SENTENCE THE COURT SHALL CONSIDER THE NATURE AND CIRCUMSTANCES OF THE OFFENSE AND THE HISTORY AND CHARACTERISTICS OF THE DEFENDANT.

TWO, THE NEED FOR THE SENTENCE IMPOSED TO REFLECT THE SERIOUSNESS OF THE OFFENSE, TO PROMOTE RESPECT FOR THE LAW AND THE PROVIDE JUST PUNISHMENT FOR THE OFFENSE, TO AFFORD ADEQUATE DETERRENCE TO CRIMINAL CONDUCT, TO PROTECT THE PUBLIC FROM OTHER CRIMES OF THE DEFENDANT AND TO PROVIDE THE DEFENDANT WITH NEEDED BOTH EDUCATIONAL OR VOCATIONAL TRAINING, MEDICAL CARE OR OTHER CORRECTIONAL TREATMENT IN THE MOST EFFECTIVE MANNER AND IN THIS PARTICULAR CASE ALSO THE KINDS OF SENTENCES AVAILABLE.

THE COURT STATES FOR THE PURPOSES OF THE RECORD THAT WITHOUT UTILIZING THE UNITED STATES SENTENCING GUIDELINES IN THIS CASE BUT IN DETERMINING WHAT IS AN APPROPRIATE SENTENCE IN THIS CASE BASED UPON THE EVIDENCE IN THE CASE, BASED UPON THE STATUTES THE DEFENDANT HAS BEEN FOUND BY A JURY TO HAVE VIOLATED, BASED UPON THE SENTENCING FACTORS SET OUT IN TITLE 18 OF THE UNITED STATES CODE, SECTION 3553(A) THAT I STATED IN THE RECORD, BASED UPON THE COURT'S EXPERIENCE, BEEN A PRACTICING LAWYER, SUPERIOR COURT JUDGE AND UNITED STATES DISTRICT JUDGE, ALL FOR SOME YEARS, THE COURT HAS IMPOSED THE SENTENCE THAT IT

HAS IN THIS CASE AS BEING THE SENTENCE REQUIRED IN ORDER TO DO JUSTICE BETWEEN THE PEOPLE AND THE DEFENDANT.

NOW, MR. DEAN, TO THE EXTENT YOU'VE NOT WAIVED -- WELL, YOU HAVEN'T WAIVED ANYTHING IN THIS CASE. YOU HAVE AN ABSOLUTE RIGHT TO APPEAL TO A HIGHER COURT THE MANY THINGS THIS COURT HAS DONE IN THIS CASE.

IF YOU DO WANT TO APPEAL TO A HIGHER COURT, YOU HAVE TO DO SO WITHIN TEN DAYS FROM TODAY OR YOU FOREVER LOSE YOUR RIGHT TO APPEAL TO A HIGHER COURT.

IF YOU DO WANT TO APPEAL TO A HIGHER COURT, THOUGH, AND YOU DON'T HAVE THE MONEY TO HIRE A LAWYER TO HANDLE YOUR CASE ON APPEAL, THE COURT WILL APPOINT COUNSEL TO REPRESENT YOU ON APPEAL, AND YOU CAN APPEAL TO A HIGHER COURT WITHOUT ANY COST WHATSOEVER TO YOURSELF, BUT IF YOU DO WANT TO APPEAL TO A HIGHER COURT, REMEMBER YOU MUST FILE THAT APPEAL WITHIN TEN DAYS FROM TODAY OR YOU FOREVER WILL LOSE YOUR RIGHT TO APPEAL TO A HIGHER COURT.

DO YOU WANT TO PUT ANY EXCEPTIONS IN THE RECORD, MR. FORSTER?

MR. FORSTER: YOUR HONOR, I WOULD OBJECT TO THE COURT'S SUSTAINING OF THE PSR'S TWO POINTS FOR OBSTRUCTION. I OBJECTED TO THAT.

I WOULD OBJECT TO THE COURT'S FAILURE TO GIVE A REDUCTION OF TWO POINTS FOR ACCEPTANCE, AND I OUTLINED ALL THAT.

I WOULD CONTINUE TO OBJECT TO THE TEN YEARS CONSECUTIVE VERSUS THE SEVEN YEARS ON THE 924(C) COUNT, THE ACCIDENTAL DISCHARGE, AND I SET FORTH MY ARGUMENTS ON THAT.

I WOULD OBJECT TO THE COURT'S SENTENCING MR. DEAN IN A CRIMINAL HISTORY 6 FOR THE REASONS THAT I HAVE ALL SET FORTH. SO I WILL CONTINUE TO LODGE THOSE SAME OBJECTIONS.

THE COURT: ALL RIGHT. WELL THANK YOU.

MR. TRAYNOR.

MR. TRAYNOR: I HAVE NO OBJECTIONS, YOUR HONOR.

THE COURT: WELL, MR. FORSTER, THANK YOU VERY MUCH FOR REPRESENTING THIS GENTLEMAN.

MR. FORSTER: MY PLEASURE, JUDGE.

THE COURT: ALL RIGHT. IF THERE IS NOTHING FURTHER, WE'LL BE IN RECESS.

MR. TRAYNOR: NOTHING FURTHER, YOUR HONOR.

(PROCEEDINGS CONCLUDED.)

C-E-R-T-I-F-I-C-A-T-E

UNITED STATES OF AMERICA

NORTHERN DISTRICT OF GEORGIA

I, ANDRE G. ASHLEY, DO HEREBY CERTIFY THAT I AM A U.S. DISTRICT REPORTER FOR THE NORTHERN DISTRICT OF GEORGIA, THAT I REPORTED THE FOREGOING AND THE SAME IS A TRUE AND ACCURATE TRANSCRIPTION OF MY MACHINE SHORTHAND NOTES AS TAKEN AFORESAID.

IN TESTIMONY WHEREOF I HAVE HEREUNTO SET MY HAND ON THIS 16TH DAY OF NOVEMBER, 2006.

ANDRE G. ASHLEY
OFFICIAL COURT REPORTER
NORTHERN DISTRICT OF GEORGIA

OPPOSITION BRIEF

120

(8) (1)

Nos. 08-5274 and 08-5298

IN THE SUPREME COURT OF THE UNITED STATES

CHRISTOPHER MICHAEL DEAN AND
RICARDO CURTIS LOPEZ, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

GREGORY G. GARRE
Solicitor General
Counsel of Record

MATTHEW W. FRIEDRICH
Acting Assistant Attorney General

JEFFREY P. SINGDAHLSEN
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Section 924(c)(1)(A)(iii) of Title 18 of the United States Code provides for a ten-year mandatory minimum sentence "if the firearm is discharged" during the commission of an offense defined in Section 924(c)(1)(A), which criminalizes using or carrying a firearm during and in relation to a crime of violence or a drug trafficking crime, or possessing a firearm in furtherance of such a crime. The question presented is whether the sentencing enhancement in Section 924(c)(1)(A)(iii) includes an implicit mens rea requirement that the firearm be discharged intentionally, rather than accidentally or involuntarily.

IN THE SUPREME COURT OF THE UNITED STATES

Nos. 08-5274 and 08-5298

CHRISTOPHER MICHAEL DEAN AND
RICARDO CURTIS LOPEZ, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-17a)[1] is reported at 517 F.3d 1224.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 2008. A petition for rehearing filed by petitioner Lopez was denied on April 15, 2008 (Pet. App. 27a). The petitions for a writ of certiorari were filed on July 11, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

---

[1] Unless otherwise noted, references to "Pet. App." are to the appendix to the petition in No. 08-5274.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioners were each convicted of conspiring to interfere with interstate commerce by robbery, in violation of the Hobbs Act, 18 U.S.C. 1951(a), and aiding and abetting each other in the use of a firearm in the commission of that robbery, a violent felony, in violation of 18 U.S.C. 924(c)(1)(A) and 2. Petitioner Dean was sentenced to 220 months of imprisonment, to be followed by five years of supervised release, and petitioner Lopez was sentenced to 198 months of imprisonment, to be followed by five years of supervised release. The court of appeals affirmed. Pet. App. 1a-17a.

1. Section 924(c)(1)(A) of Title 18 of the United States Code provides in relevant part:

> [A]ny person who, during and in relation to any crime of violence or drug trafficking crime * * * for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. 924(c)(1)(A). Paragraph (c)(4) defines "brandish" for purposes of subsection (c) to mean "to display all or part of the

firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person." 18 U.S.C. 924(c)(4).

2. On November 10, 2004, a masked man carrying a pistol entered the Rome, Georgia, branch of the AmSouth Bank and ordered everyone in the bank to the ground. The robber entered the teller's area. There, he began removing cash from the drawers with one hand, while continuing to hold the pistol in his other hand. At one point, the robber reached over a teller, who was on her knees below her teller station, to remove cash from a teller drawer. While he was removing the cash, he discharged the pistol. The bullet struck a partition between two tellers' work stations, leaving a hole. The robber cursed when the gun fired, as if it had been inadvertent. The robber fled the bank and entered a vehicle waiting outside for his escape. Pet. App. 3a-4a.

A short while later, the police located the get-away vehicle in the parking lot of an apartment complex and determined that the vehicle had been stolen from a used-car dealership the night before. The police also observed petitioner Dean approach the vehicle and look into the driver's window. The police questioned petitioner Dean and arrested him on a probation violation. Gov't C.A. Br. 4-6.

In response to questions, petitioner Dean gave the officers his address in an adjacent apartment complex. When an officer approached the apartment, he observed petitioner Lopez inside the apartment. The officer also observed a pile of money on top of a television, some of which was still wrapped in a bank band. Officers subsequently entered the apartment and arrested petitioner Lopez, whom they found hiding in a bedroom. A search of the apartment uncovered the pistol that had been used in the robbery, a spent shell casing, cash, as well as keys and other materials from the car dealership from which the get-away vehicle had been stolen. Gov't C.A. Br. 6-7, 15.

Before trial, petitioners each confessed to committing the robbery. Each, however, claimed sole responsibility for the robbery and denied any involvement by the other. Pet. App. 4a; Gov't C.A. Br. 7-11.

3. A federal grand jury in the Northern District of Georgia returned a two-count superseding indictment charging each petitioner with conspiring to interfere with interstate commerce by robbery, in violation of the Hobbs Act, 18 U.S.C. 1951(a) (Count One), and aiding and abetting each other in the use of a firearm in the commission of that robbery, a violent felony, in violation of 18 U.S.C. 924(c)(1)(A) and 2 (Count Two). The superseding indictment alleged that the firearm was discharged during the commission of the offense charged in Count Two. Superseding

Indictment 2. Following trial, a jury found petitioners guilty on both counts. Pet. App. 4a.

At sentencing, the probation office recommended that the court find that each petitioner was subject to a ten-year mandatory minimum sentence on Count Two under 18 U.S.C. 924(c)(1)(A)(iii), because the firearm was discharged during the robbery. Lopez Presentence Report ¶ 36; Dean Presentence Report ¶ 36. Petitioners each objected, claiming that the evidence showed that the gun had discharged accidentally and that Section 924(c)(1)(A)(iii) does not apply to accidental discharges. See, e.g., Pet. App. 35a-36a, 41a.

The district court overruled petitioners' objections, holding that Section 924(c)(1)(A)(iii) applies when a firearm is discharged accidentally. Pet. App. 51a-52a. Consistent with that ruling, the court sentenced petitioner Dean to a 100-month sentence on Count One and a consecutive ten-year mandatory minimum sentence on Count Two, for a total sentence of 220 months of imprisonment. The court sentenced petitioner Lopez to a 78-month sentence on Count One and a consecutive ten-year mandatory minimum sentence on Count Two, for a total sentence of 198 months of imprisonment. The court also sentenced each petitioner to five years of supervised release. Id. at 4a-5a, 21a-22a; 08-5298 Pet. App. 3-4.

4. The court of appeals affirmed. Pet. App. 1a-17a. On the question whether Section 924(c)(1)(A)(iii) requires proof of intent to discharge the firearm, the court first stated that the

"[t]estimony at trial supports [petitioner] Dean's assertion that the discharge of the firearm inside the bank was a surprise even to Dean and, thus, was likely accidental." Pet. App. 9a. The court held, however, that because the statute does not require proof that petitioners intended to discharge the firearm, the ten-year minimum under Section 924(c)(1)(A)(iii) applies. Id. at 9a-12a.

The court of appeals reasoned that the text of Section 924(c)(1)(A)(iii) does not impose an intent requirement and that, because clause (c)(1)(A)(iii) defines a sentencing enhancement rather than a criminal offense, the general presumption in favor of inferring mens rea does not apply. Pet. App. 9a-11a (citing United States v. Brantley, 68 F.3d 1283, 1289-1290 (11th Cir. 1995), cert. denied, 516 U.S. 1136 and 517 U.S. 1111 (1996); United States v. Nava-Sotelo, 354 F.3d 1202 (10th Cir. 2003), cert. denied, 541 U.S. 1035 (2004)). The court explained that declining to infer a mens rea requirement for the sentencing enhancement does not risk punishing an innocent defendant because mens rea is already required for the "underlying violent or drug trafficking crime." Id. at 10a.

The court rejected the conclusion of the D.C. Circuit in United States v. Brown, 449 F.3d 154 (2006). Pet. App. 11a-12a. The court explained that, contrary to the reasoning of the D.C. Circuit, the increased mandatory minimum sentences in Section 924(c)(1)(A) do not reflect solely a defendant's increasingly

culpable intent, but also reflect the fact that "discharging a firearm, regardless of intent, presents a greater risk of harm than simply brandishing a weapon without discharging it." Id. at 11a. The court also rejected the D.C. Circuit's reliance on the "general presumption against strict liability in criminal statutes," in light of the "distinction between elements of an offense and sentencing enhancements." Id. at 12a.[2]

ARGUMENT

Petitioners renew their claim (08-5274 Pet. 6-16; 08-5298 Pet. 14-24) that Section 924(c)(1)(A)(iii) includes an implicit mens rea requirement that the firearm was intentionally, rather than accidentally or involuntarily, discharged. The decision below is correct, and further review is not warranted.

1. a. The court of appeals correctly held that the enhancement to the mandatory minimum sentence in Section 924(c)(1)(A)(iii) does not include a mens rea requirement; it requires proof only that the firearm was discharged during the commission of the offense. Whether clause (c)(1)(A)(iii) requires mens rea "is a question of statutory construction." Staples v. United States, 511 U.S. 600, 604 (1994). As such, the starting point, and the ending point if the language is clear, is the text of the provision. See United States v. Gonzales, 520 U.S. 1, 4-6

---

[2] The court of appeals also rejected petitioners' other claims, see Pet. App. 5a-8a, 12a-17a, none of which is renewed in their petitions in this Court.

(1997) (applying this principle to a prior version of Section 924(c)). Here, the language is "coherent, complete, and by all signs exclusive," Burgess v. United States, 128 S. Ct. 1572, 1580 (2008), and it imposes no requirement that the firearm was discharged intentionally.

As this Court has explained, the opening of Section 924(c)(1)(A) "list[s] the elements of a complete crime." Harris v. United States, 536 U.S. 545, 552 (2002). Clauses (A)(i) through (A)(iii), in turn, alter the applicable mandatory minimum sentences, within the maximum of life imprisonment, depending on the factual circumstances -- five years for any violation of the offense; seven years if the firearm was brandished; and ten years if the firearm was discharged. 18 U.S.C. 924(c)(1)(A)(i)-(iii). Those clauses do not define separate offenses, but instead set out "paradigmatic sentencing factor[s]." Harris, 536 U.S. at 553. As this Court explained, "[t]he statute regards brandishing and discharging as sentencing factors to be found by the judge, not offense elements to be found by the jury." See id. at 556. And the text of the "discharge" sentencing factor provides simply that anyone who violates Section 924(c)(1)(A) shall, "if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years." 18 U.S.C. 924(c)(1)(A)(iii) (emphasis added). That text requires no proof of any particular mens rea; rather, it calls for a ten-year mandatory minimum if a "certain fact[] [is]

present," namely discharge of the firearm. Harris, 536 U.S. at 553.

Petitioners nevertheless contend (08-5274 Pet. 6, 10-12; 08-5298 Pet. 17-20) that an intent requirement should be read into the statute. They point to this Court's decisions applying the principle that "in the absence of contrary statutory language a criminal statute is presumed to require proof that the criminal act was committed volitionally, not merely by mistake or accident." 08-5274 Pet. 6. They contend that the presumption applies not only to the "actus reus of the crime," Carter v. United States, 530 U.S. 255, 268 (2000), but to sentencing enhancements as well.

The bases for that presumption, however, are lacking here. This Court's cases apply that presumption to the non-jurisdictional elements of a criminal offense "in light of the background rules of common law, * * * in which the requirement of some mens rea for a crime is firmly embedded." Staples, 511 U.S. at 605 (internal citation omitted); see Morissette v. United States, 342 U.S. 246, 252 (1952) ("courts assumed that the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation"). But there is no corresponding "universal and persistent," id. at 250, practice under the common law of requiring a separate mens rea for any facts a judge relies on to increase the sentence within the statutory maximum. Compare United

States v. Balint, 258 U.S. 250, 251-252 (1922) ("[T]he general rule at common law was that the scienter was a necessary element in the indictment and proof of every crime, and this was followed in regard to statutory crimes even where the statutory definition did not in terms include it."), with Harris, 536 U.S. at 560 ("If the facts judges consider when exercising their discretion within the statutory range are not elements, they do not become as much merely because legislatures require the judge to impose a minimum sentence * * * . These facts, though stigmatizing and punitive, have been the traditional domain of judges; they have not been alleged in the indictment or proved beyond a reasonable doubt."). In the absence of a uniform, longstanding practice in this regard, there is no reason to presume that Congress intended, sub silentio, to include a mens rea requirement in a "paradigmatic sentencing factor," Harris, 536 U.S. at 553, such as the discharge of a firearm during the commission of a violent felony.

Nor, contrary to petitioner Lopez's contention (at 20), is the concern about "criminaliz[ing] a broad range of apparently innocent conduct," Liparota v. United States, 471 U.S. 419, 426 (1985), implicated by the sentencing enhancement here. See Carter, 530 U.S. at 269 ("The presumption in favor of scienter requires a court to read into a statute only that mens rea which is necessary to separate wrongful conduct from otherwise innocent conduct.") (internal quotation marks omitted). The enhancement applies only

when an offender uses or carries a firearm during, or possesses a firearm in furtherance of, the commission of a crime of violence or drug trafficking crime. In that circumstance, the commission of both the underlying drug or violent crime and the firearm offense in Section 924(c)(1)(A) establish the offender's requisite "vicious will." Morissette, 342 U.S. at 251 (internal quotation marks omitted). Moreover, there is no potentially "innocent conduct" associated with using a firearm to commit a violent felony or drug trafficking crime. Once offenders choose to use a gun to commit a violent or drug offense, they "understand the wrongful nature of their act," and the purpose of the intent requirement to distinguish them "from those who do not" has been accomplished; the law "does not require knowledge of the precise consequences that may flow from that act once aware that the act is wrongful." United States v. X-Citement Video, Inc., 513 U.S. 64, 73 n.3 (1994); see United States v. Feola, 420 U.S. 671, 685 (1975) (noting, in rejecting scienter requirement for assault-victim's status as a federal officer, that "[t]he situation is not one where legitimate conduct becomes unlawful solely because of the identity of the individual or agency affected").[3]

---

[3] For that reason, petitioner Lopez cannot validly rely (at 20) on the Court's concern in Staples that criminalizing possession of a machinegun, absent proof of knowledge of the characteristics that make it a machinegun, would risk criminalizing innocent conduct given the "long tradition of widespread lawful gun ownership by private individuals." Staples, 511 U.S. at 610; see id. at 614-615.

b. Petitioners contend (08-5274 Pet. 7-8; 08-5298 Pet. 15) that "the first two subsections of the statute, the 'use' and 'brandishment' provisions, require proof that the defendant committed the act intentionally," and that "[i]t follows that the third subsection, which is phrased in the same manner, should likewise be interpreted to include a scienter requirement." 08-5274 Pet. 7. That is incorrect.

To begin, clause (i) requires no additional fact or mens rea beyond the commission of the offense; it merely "sets a catchall minimum" for the crime. Harris, 536 U.S. at 552-553. Because it requires no additional mens rea, clause (i) does not support the claim that Congress followed a consistent course of imposing a unique, enhancement-specific mens rea for each clause. Nor does it follow from Congress's inclusion of a mens rea requirement in connection with clause (ii) that there is an implicit mens rea requirement in clause (iii), because clause (iii) "is phrased in the same manner." The claim ignores the fact that the mens rea requirement for clause (ii) does not flow from the language in clause (ii), but from Congress's inclusion of a separate provision defining "brandish." See 18 U.S.C. 924(c)(4). Congress could have defined "discharge" to require mens rea, but it did not, and the word standing alone lacks that connotation. The natural inference is that, when Congress imposed a mens rea requirement, it did so explicitly. And its decision not to do the same as to clause (iii)

must be given effect by the courts in construing the statute. See Russello v. United States, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion and exclusion.") (alteration in original; internal quotation marks omitted); see Gonzales, 520 U.S. at 5 (applying this principle to a prior version of Section 924(c)).[4]

Nor is there a basis for petitioner Dean's assertion (at 7) that the sole purpose of the enhancements in clauses (i)-(iii) is to provide increased punishment for increased moral culpability. Sentencing considerations routinely reflect not only an offender's relative moral culpability (in the narrow sense in which petitioner Dean uses that phrase), but also the harms resulting from the offense. The sentencing enhancements in Section 924(c)(1)(A)(ii) and (iii) reflect those dual considerations. The enhancement when the firearm is discharged, for instance, reflects not only a sense of increased moral culpability, but the increased risks that death or injury will result, that violence will be used to respond to the

---

[4] The D.C. Circuit held that this principle did not apply to Section 924(c)(1)(a) because, "[h]aving embarked on a definition, the drafter thought it proper to specify the required intent." United States v. Brown, 449 F.3d 154, 157 (2006). Particularly where the definition and clauses (ii) and (iii) were all enacted in the same legislation, see Pub. L. No. 105-386, 112 Stat. 3469-3470 (1998), this reasoning does not explain why Congress specified no intent for "discharge."

offender, and that victims will be terrorized to an even greater extent when a firearm is discharged than brandished. Even if one assumes for sake of argument that there is no greater moral culpability where a firearm is discharged accidentally, an accidental discharge still implicates the latter three risks and harms.

The D.C. Circuit recognized that clauses (i)-(iii) address "increasingly culpable or harmful conduct," and that, "[t]o be sure, discharges of a firearm are more likely to cause severe injury or even death than mere brandishing." United States v. Brown, 449 F.3d 154, 156-157 (2006). Nevertheless, it relied on a policy argument that, "[n]onetheless, as between an intentional brandishing and a purely accidental discharge, the increment in risk, given the less reprehensible intent, seems inadequate to explain a congressional intent to add three years." Id. at 157. Particularly in the absence of a presumption of a mens rea requirement, the D.C. Circuit's speculation as to how much additional risk of harm or injury Congress thought was sufficient to warrant increasing the mandatory minimum is inadequate to overcome the plain language of the provision, which imposes no intent requirement. Rather, the text indicates that Congress intended to levy increased punishment on all who, as a result of using, carrying, or possessing a loaded firearm during a drug or violent crime, discharge it, whether accidentally or purposefully.

c. Petitioners further assert (08-5274 Pet. 13-14; 08-5298 Pet. 22-24), that the decision below conflicts with this Court's precedents applying the rule of lenity because the statute here, properly construed, is ambiguous. But this Court's review of the correct application of well-established rule-of-lenity principles to this particular statute is not warranted. In any event, for the reasons discussed above, there is no "grievous ambiguity or uncertainty in the statute" such that, "after seizing everything from which aid can be derived," the Court "can make no more than a guess as to what Congress intended." Muscarello v. United States, 524 U.S. 125, 138-139 (1998) (internal quotation marks omitted).[5]

d. Petitioner Lopez further contends (at 17-18, 21-22) that the decision below is inconsistent with this Court's precedents defining public welfare statutes. That contention is without merit. In the case of public welfare statutes, the question is whether the presumption that criminal offenses include mens rea is overcome by Congress's intent to override the presumption. See generally Staples, 511 U.S. at 605-619. In contrast, as explained

---

[5] Contrary to petitioner Dean's assertion (at 14), "the very existence of a circuit split on this question of law" does not establish that there is ambiguity triggering application of the rule of lenity. This Court has specifically rejected that proposition. Moskal v. United States, 498 U.S. 103, 108 (1990) ("Nor have we deemed a division of judicial authority automatically sufficient to trigger lenity. * * * If that were sufficient, one court's unduly narrow reading of a criminal statute would become binding on all other courts, including this one.") (internal citation omitted).

above, the presumption is inapplicable here because there is no background universal and long-standing practice of requiring mens rea for sentencing factors.

2. Petitioners claim a circuit conflict (08-5274 Pet. 6-9; 08-5298 Pet. 15-17), pointing to the D.C. Circuit's decision in Brown, supra, and the Ninth Circuit's decision in United States v. Dare, 425 F.3d 634 (2005), cert. denied, 548 U.S. 915 (2006), on the one hand, and the court below and the Tenth Circuit, United States v. Nava-Sotelo, 354 F.3d 1202 (2003), cert. denied, 541 U.S. 1035 (2004), on the other. The Ninth Circuit decision in Dare, however, did not fully consider or squarely decide whether clause (iii) includes no mens rea requirement. The court addressed the defendant's claim that clause (iii) requires specific intent, which he claimed was lacking because he was intoxicated. Dare, 425 F.3d at 641-641 n.3. In rejecting that claim in a footnote, the court stated that "a 'discharge' requires only a general intent," and that "[v]oluntary intoxication is not a defense to a general intent offense." Ibid. In light of the footnote's cursory nature, and the fact that a rejection of specific intent was sufficient to resolve the defendant's claim in Dare, it is far from clear that future panels of the Ninth Circuit will feel bound if faced with a claim that no mens rea is required. See United States v. Gonzalez, 262 F.3d 867, 870 & n.1 (9th Cir. 2001) (declining to follow earlier case applying mens rea analysis to Sentencing Guidelines

provision given the decision's absence of "any discussion of a distinction between criminal statutes and guideline enhancements"). Indeed, there is Ninth Circuit authority pointing in the direction of no mens rea. In United States v. Wright, 215 F.3d 1020 (9th Cir.), cert. denied, 531 U.S. 969 (2000), the court held that the Guidelines enhancement in Section 2B3.1(b)(2)(A), which uses almost identical language to that in Section 924(c)(1)(A), applies to accidental discharges. Id. at 1030; see Harris, 536 U.S. at 553-554 (noting connection between the Guidelines enhancements for brandishing and discharging a firearm and Sections 924(c)(1)(A)(ii)-(iii)). And the Ninth Circuit has rejected claims that the presumption of mens rea for criminal offenses applies to sentencing enhancements. See Gonzalez, 262 F.3d at 870; United States v. Lavender, 224 F.3d 939, 941 (9th Cir. 2000) ("Sentencing factors * * * are not separate criminal offenses and as such are not normally required to carry their own mens rea requirement."), cert. denied, 531 U.S. 1098 (2001).

The D.C. Circuit's decision in Brown is in conflict with the decision below. But it is the only circuit decision squarely adopting the view espoused by petitioners, and the en banc court may be willing to revisit the issue if the question recurs and the government seeks en banc review.[6] Moreover, at least as reflected

---

[6] The government did not petition for rehearing en banc in Bro[illegible]

in the reported cases, the specific issue of whether an accidental discharge supports an increase in the mandatory minimum does not arise frequently. Further review is thus unwarranted at this time.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

GREGORY G. GARRE
Solicitor General

MATTHEW W. FRIEDRICH
Acting Assistant Attorney General

JEFFREY P. SINGDAHLSEN
Attorney

OCTOBER 2008

REPLY BRIEF

120

(9)

No. 08-5274

IN THE

Supreme Court of the United States

CHRISTOPHER MICHAEL DEAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JEFFREY T. GREEN
QUIN M. SORENSON
AMY L. HANKE
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

SCOTT J. FORSTER*
P.O. Box 102
Calhoun, Georgia 30703
(706) 625-1799

Counsel for Petitioner

* Counsel of Record

October 28, 2008

REPLY

The petition for writ of certiorari amply demonstrated the need for this Court's review of the issue of whether 18 U.S.C. § 924(c)(1)(A)(iii), establishing a ten-year mandatory minimum sentence for a defendant who "discharge[s]" a firearm during a crime of violence, requires proof of general intent. First, there is a clear split among the circuits on this question, with two courts of appeals holding that proof of general intent is required, *United States* v. *Brown*, 449 F.3d 154, 158 (D.C. Cir. 2006); *United States* v. *Dare*, 425 F.3d 634, 641 n.3 (9th Cir. 2005), *cert. denied*, 548 U.S. 915 (2006), and two courts holding to the contrary, *United States* v. *Dean*, 517 F.3d 1224, 1230 (11th Cir. 2008); *United States* v. *Nava-Sotelo*, 354 F.3d 1202, 1206-07 (10th Cir. 2003). Second, the judgment of the Eleventh Circuit in this case, concluding that the statute applies even absent proof of intent, is flatly inconsistent with prior decisions of this Court, particularly *Carter* v. *United States*, 530 U.S. 255 (2000). Finally, the divide among the courts of appeals means that similarly situated defendants convicted of the same crime will be subject to significantly different sentences merely because they were prosecuted in different jurisdictions.

Nothing in the government's brief in opposition counters the fundamental points that a clear, entrenched 2-2 split exists and that the underlyng decision contravenes this Court's precedents. Instead, the brief argues the merits, contending that its preferred interpretation of § 924(c)(1)(A)(iii) – under which a defendant may be sentenced to a ten-year mandatory minimum sentence for involuntary conduct – is correct. But it is for this Court, not the government, to determine which of two reasonable

interpretations of a criminal statute correctly expresses congressional intent. The very fact that the government devotes the majority of its opposition to arguing the merits of the legal question demonstrates the need for this Court's review.

1. The government concedes that the question presented has divided the circuit courts. Opp. at 17. The Ninth and D.C. Circuits hold that § 924(c)(1)(A)(iii) requires proof that the defendant discharged the firearm intentionally, not merely by mistake or accident. *United States* v. *Brown*, 449 F.3d 154, 158 (D.C. Cir. 2006); *United States* v. *Dare*, 425 F.3d 634, 641 n.3 (9th Cir. 2005), *cert. denied*, 548 U.S. 915 (2006). The Tenth and (now) Eleventh Circuits hold to the contrary that a defendant may be found to have violated § 924(c)(1)(A)(iii) – implicating the ten-year mandatory minimum sentence – even if the discharge was purely accidental and unintentional. *United States* v. *Dean*, 517 F.3d 1224, 1230 (11th Cir. 2008); *United States* v. *Nava-Sotelo*, 354 F.3d 1202, 1206-07 (10th Cir. 2003).

The brief offers little more than speculation that the split might be amerliorated – though not resolved – because the *en banc* D.C. Circuit "*may* be willing to revisit the issue *if* the question recurs and [*if*] the government seeks en banc review." Opp. at 17 (emphasis added). This argument is hardly persuasive. If it were, splits would not be "real" splits unless and until the en banc circuit court's had lined up on different sides of a particular issue – a standard that that this Court does not apply. And in this case, even the Solictor General's speculation is weak, given that the holding of the D.C. Circuit is clear, the panel (Williams, J., joined by Randolph and Tatel, JJ.) was unanimous, and the split was

explicitly ackowledged in the decision. See *Brown*, 449 F.3d at 156-59.

The government similarly argues that the decision of the Ninth Circuit in *United States* v. *Dare*, 425 F.3d 634 (9th Cir. 2005), should be discounted because the court's discussion of § 924(c)(1)(A)(iii) was "cursory" and did not "squarely decide" whether the statute requires proof of general intent. Opp. at 16. To the contrary, the Ninth Circuit unequivocally addressed this point: "We conclude that a 'discharge' [under § 924(c)(1)(A)(iii)] requires only a general intent." 425 F.3d at 641 n.3. There is no reason to believe that "future panels of the Ninth Circuit will [not] feel bound" by this decision, Opp. at 16, or that other federal courts will not view it as an authoritative statement of the Ninth Circuit's position on the issue. Certainly the D.C. Circuit characterized it as such in *Brown*, citing *Dare* as reflecting one side in the extant circuit split on the interpretation of § 924(c)(1)(A)(iii). *Brown*, 449 F.3d at 156.

2. The government also mounts a weak challenge to petitioner's argument that the decision of the Eleventh Circuit runs counter to this Court's opinion in *Carter* v. *United States*, 530 U.S. 255 (2000). That opinion states that, although criminal statutes will be presumed to incorporate a "specific intent" element only when necessary "to separate wrongful from 'otherwise innocent' conduct," they are *always* presumed to require proof of "general intent" (at least absent contrary statutory language). *Id.* at 268-70. As the petition concluded, "[t]he reasoning in *Carter* ... controls this case[] and compels an outcome contrary to that of the Eleventh Circuit." Pet. at 11.

Carter earns barely a mention in the government's brief. Much of the government's discussion simply

ignores its holding, arguing (incorrectly) that proof of general intent is not always required but should be implied only when necessary "to separate wrongful from 'otherwise innocent' conduct." Opp. at 10-11. When *Carter* is mentioned, it is quickly discounted on the basis that the presumption of *mens rea* applies only to the *actus reus* of the crime, and not to "sentencing enhancements" like § 924(c)(1)(A)(iii). *Id.* at 9. But the government cites no case from this Court stating this principle, and it ignores the numerous decisions that cast doubt on such formalistic distinctions between "elements" and "enhancements." *E.g.*, *Apprendi* v. *New Jersey*, 530 U.S. 466, 494 (2000) (rejecting distinction between "elements" and "sentencing factors" in Fifth Amendment analysis); *Mitchell* v. *United States*, 526 U.S. 314, 327 (1999) (the Fifth Amendment applies equally to issues concerning "the severity of... punishment" as to those concerning "guilt or innocence").

As noted, the remainder of the brief in opposition asserts that § 924(c)(1)(A)(iii) should apply even to involuntary conduct. These arguments, far from undermining the petition for certiorari, actually underscore the need for this Court's review. *Carter* held that a general intent requirement must be applied to criminal statutes in the absence of a specific exception that calls for the application of a higher or lower *mens rea* standard; on its face, that opinion compels an interpretation of § 924(c)(1)(A)(iii) which requires proof of volitional conduct. *Carter*, 530 U.S. at 268-70. To adopt a contrary construction of the statute, as the Eleventh Circuit has done, is to ask the Court to create a new exception or limitation in abrogation of *Carter*. But it is for this Court alone to re-examine and interpret its own decisions. The

fact that lower courts have restricted or obviated *Carter*'s holding, on the rationale espoused by the government here, simply confirms the need for this Court's review.

3. The government's brief also ignores the exceptional importance of this issue. The split among the circuits over the interpretation of § 924(c)(1)(A)(iii) means that similarly situated defendants convicted of the same crime will be subject to an additional three-year mandatory minimum term of imprisonment in the Tenth and Eleventh Circuits merely because those jurisdictions have adopted a construction of the statute contrary to *Carter*. Beyond the obvious and significant deprivation of individual liberty, this result runs counter to the purpose of the Sentencing Reform Act and to the very notion of a fair and uniform national sentencing system. See S. Rep. No. 98-225, at 65 (1983) (noting that the purpose of the Sentencing Reform Act was to eliminate "shameful disparity in criminal sentences" among jurisdictions).

The only objection the government can raise to this point is that, "in the reported cases, the specific issue of whether an accidental discharge supports an increase in the mandatory minimum does not arise frequently." Opp. at 18. But the government offers no support for this speculation, and it certainly ignores the thousands of other cases that are resolved not by trial but by plea bargain, and are never reported.

More fundamentally, by focusing solely on the aggregate effect, the government misses the undeniable and overwhelming impact of this issue on individual defendants, like Mr. Dean. Mr. Dean was convicted of participating in a bank robbery in which a firearm was accidentally discharged, and was

sentenced to a mandatory minimum ten-year term of imprisonment under § 924(c)(1)(A)(iii). Had he been convicted of the same conduct in the Ninth or D.C. Circuits, he would have been subject to only a seven-year mandatory term of imprisonment. His additional three-year term of incarceration is a result of nothing more than the happenstance of where the crime was committed. The government's suggestion that this situation does not arise "frequently" does not justify the devastating consequences of the Eleventh Circuit's rule to Mr. Dean and others like him.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JEFFREY T. GREEN
QUIN M. SORENSON
AMY L. HANKE
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

SCOTT J. FORSTER*
P.O. Box 102
Calhoun, Georgia 30703
(706) 625-1799

Counsel for Petitioner

October 28, 2008

* Counsel of Record

JOINT APPENDIX

Supreme Court, U.S
FILED
JAN 5 - 2009
OFFICE OF THE CLERK

No. 08-5274

IN THE

Supreme Court of the United States

CHRISTOPHER MICHAEL DEAN

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

—

JOINT APPENDIX: VOL. I OF II

SCOTT J. FORSTER*
P.O. Box 102
Calhoun, GA 30703
(706) 625-1799

JEFFREY T. GREEN
QUIN M. SORENSON
AMY L. HANKE
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

Counsel for Petitioner

GREGORY G. GARRE*
SOLICITOR GENERAL
MATTHEW W. FRIEDRICH
ACTING ASSISTANT ATTORNEY GENERAL
MICHAEL R. DREEBEN
DEPUTY SOLICITOR GENERAL
DEANNE E. MAYNARD
ASSISTANT TO THE SOLICITOR GENERAL
VIJAY SHANKER
ATTORNEY
DEPARTMENT OF JUSTICE
950 Pennsylvania Ave., N.W.
Washington, DC 20530
(202) 514-2217

Counsel for Respondent

* Counsel of Record

January 5, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

PETITION FOR CERTIORARI FILED JULY 11, 2008
CERTIORARI GRANTED NOVEMBER 14, 2008

TABLE OF CONTENTS

Volume One

	Page
United States District Court, Northern District of Georgia, Relevant Docket Entries	1
United States Court of Appeals, Eleventh Circuit, Relevant Docket Entries	7
First Superseding Criminal Indictment, *United States* v. *Ricardo Curtis Lopez & Christopher Michael Dean*, No. 4:04-CR-0072 (N.D. Ga. filed June 14, 2005)	11
Trial Transcript, *United States* v. *Ricardo Curtis Lopez, Christopher Michael Dean*, No. 4:04-CR-0072 (N.D. Ga. May 1-4, 2006) (excerpts)	13
Verdict Form, *United States* v. *Christopher Michael Dean*, No. 4:04-CR-0072 (N.D. Ga. May 4, 2006)	82
Sentencing Hearing Transcript, *United States* v. *Ricardo Curtis Lopez, Christopher Michael Dean*, No. 4:04-CR-0072 (N.D. Ga. Aug. 31, 2006)	83
United States v. *Christopher Michael Dean*, No. 4:04-CR-0072 (N.D. Ga. Sept. 5, 2006) (judgment)	124
Notice of Appeal, *United States* v. *Christopher Dean*, No. 4:04-CR-0072 (N.D. Ga. filed Sept. 7, 2006)	132

TABLE OF CONTENTS continued

Page

United States v. *Dean*, 517 F.3d 1224 (11th Cir. 2008) 133

United States v. *Christopher Michael Dean, et al.*, No. 06-14918 (11th Cir. Feb. 20, 2008) (judgment) 148

United States v. *Christopher Michael Dean, et al.*, No. 06-14918 (11th Cir. Apr. 15, 2008) (order denying rehearing) 149

Volume Two

Presentence Investigation Report, *United States* v. *Christopher Michael Dean*, No. 4:04-CR-0072 (N.D. Ga. filed Sept. 13, 2006) 150

U.S. DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA (ROME)

No. 4:04-00072-02

UNITED STATES OF AMERICA
Plaintiff,

v.

CHRISTOPHER MICHAEL DEAN
Defendant.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
06/14/2005	27	FIRST SUPERSEDING INDICTMENT as to Ricardo Curtis Lopez (1) count(s) 1s, 2s, Christopher Michael Dean (2) counts(s) 1, 2. (jph) (Entered: 06/22/2005)
		* * * *
08/30/2005	44	Minute Entry for proceedings held before Magistrate Judge Walter E. Johnson : Arraignment and INITIAL APPEARANCE as to Christopher Michael Dean. PLEA of NOT GUILTY by Christopher Michael Dean as to counts 1,2. Estimated Trial Time-Short. (Attachments: # 1 Plea with Counsel)(Tape #26 @ 5602) (klb) (Entered: 08/30/2005)
		* * * *

DATE	NO.	PROCEEDINGS
04/05/2006	69	NOTICE SETTING TRIAL as to Ricardo Curtis Lopez, Christopher Michael Dean, Jury Trial set for 5/1/2006 10:00 AM in Courtroom 300 before Judge Harold L. Murphy. (smj) (Entered: 04/05/2006)
		* * * *
05/01/2006		Minute Entry for proceedings held before Judge Harold L. Murphy : Voir Dire Begun Ricardo Curtis Lopez (1) on Count 1,1s,2,2s and Christopher Michael Dean (2) on Count 1,2. (Court Reporter Dennis J. Reidy)(bjj) (Entered: 05/04/2006)
05/01/2006	78	Minute Entry for proceedings held before Judge Harold L. Murphy : Jury Impaneled as to Ricardo Curtis Lopez, Christopher Michael Dean. Jury Selection held on 5/1/2006 as to Ricardo Curtis Lopez, Christopher Michael Dean. Jury Trial begun as to Ricardo Curtis Lopez, Christopher Michael Dean on 5/1/2006. Govt Evidence Begins: Jimmy Tanner sworn, Govt Exh 1-4,5A-5E,6, Admitted, Nora Hall, Rodney Clemons, and George Lemming sworn, Govt Exh 7-12, 14, Admitted, Perry Maynard sworn, Govt Exh 13 Admitted. (Court Reporter Dennis J. Reidy)(bjj) (Entered: 05/04/2006)

DATE	NO.	PROCEEDINGS
05/02/2006	79	Minute Entry for proceedings held before Judge Harold L. Murphy : Jury Trial held as to Ricardo Curtis Lopez, Christopher Michael Dean on 5/2/2006. Govt Evidence cont'd: Jesse Adams and Peter J. Connolly sworn, Govt Exh 31,18,16,17,15,23,19,20,21 Admitted; Jennifer Luttman sworn, Govt Exh 32 Admitted; Dallas Battle sworn, Govt Exh 22,24,30,29, Admitted; Tim Smith sworn, Govt Exh 25,26 Admitted; John Clubb and Charles Reed sworn, Govt Exh 27,33 Admitted. (Court Reporter Dennis J. Reidy)(bjj) (Entered: 05/04/2006)
05/03/2006	80	Minute Entry for proceedings held before Judge Harold L. Murphy : Jury Trial held as to Ricardo Curtis Lopez, Christopher Michael Dean on 5/3/2006. Govt Evidence cont'd. Oral Motion by each Deft for Judgment of Acquittal - each motion orally denied. Deft Lopez orally renews Motion to Surpress the Evidence - Ct orally denies motion. (Court Reporter Dennis J. Reidy)(bjj) (Entered: 05/04/2006)
		* * * *
05/04/2006	81	Minute Entry for proceedings held before Judge Harold L. Murphy: Jury Trial concluded as to Ricardo Curtis Lopez, Christopher Michael Dean, held on 5/4/2006. Verdict Returned:

DATE	NO.	PROCEEDINGS
		Guilty as to each count as to each Deft. (Attachments: # 1 Exhibits) (Court Reporter Dennis J. Reidy)(bjj) (Entered: 05/05/2006)
		* * * *
05/04/2006	84	JURY VERDICT as to Christopher Michael Dean (2) Guilty on Count 1,2. (bjj) (Entered: 05/05/2006)
		* * * *
08/21/2006	90	NOTICE OF SENTENCING Reset as to Ricardo Curtis Lopez, Christopher Michael Dean Sentencing set for 8/31/2006 01:30 PM in Courtroom 300 before Judge Harold L. Murphy. (smj) (Entered: 08/21/2006)
08/31/2006	92	Minute Entry for proceedings held before Judge Harold L. Murphy : Sentencing held as to Christopher Michael Dean; BOP for 100 Months as to Count 1 and 120 Months as to Count 2 for a total of 220 Months; Restitution in the amount of $2,605.00; S/A of $200.00; S/R for 5 Years; Deft remanded to custody of USM. (Court Reporter Dennis J. Reidy)(bjj) (Entered: 09/05/2006)
09/05/2006	94	JUDGMENT AND COMMITMENT as to Christopher Michael Dean (2), Count(s) 1, CBOP FOR 100 MONTHS ON COUNT ONE, TO BE SERVED CONSECUTIVELY WITH COUNT TWO, FOR A TOTAL OF

DATE	NO.	PROCEEDINGS
		220 MONTHS; SUPERVISED RELEASE FOR THREE YEARS ON COUNT ONE, TO BE SERVED CONCURRENTLY WITH COUNT TWO, FOR A TOTAL OF 5 YEARS W/STANDARD & SPECIAL CONDITIONS; S/A OF $100.00 FOR A TOTAL OF $200.00; RESTITUTION $2,605.00; Count(s) 2, CBOP FOR 122 MONTHS ON COUNT TWO, TO BE SERVED CONSECUTIVELY WITH COUNT ONE, FOR A TOTAL OF 220 MONTHS; SUPERVISED RELEASE FOR FIVE YEARS ON COUNT TWO, TO BE SERVED CONCURRENTLY WITH COUNT ONE, FOR A TOTAL OF 5 YEARS W/STANDARD & SPECIAL CONDITIONS; S/A OF $100.00 FOR A TOTAL OF $200.00; RESTITUTION $2,605.00. Signed by Judge Harold L. Murphy on 9/5/06.(bjj) Please refer to http://www.call.uscourts.gov to obtain an appeals jurisdiction checklist (Entered: 09/05/2006)
09/07/2006	95	NOTICE OF APPEAL as to Christopher Michael Dean. Transcript Order Form due on 9/21/2006 (Forster, Scott) (Entered: 09/07/2006)

* * * *

DATE	NO.	PROCEEDINGS
09/13/2006		PRESENTENCE INVESTIGATION REPORT (Sealed) as to Christopher Michael Dean. (in vault) (jta) (Entered: 09/13/2006)

* * * *

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-14918-EE

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

CHRISTOPHER MICHAEL DEAN,
Defendant-Appellee.

RELEVANT DOCKET ENTRIES

File Date	Entry	Party	Pending
	* * * *		
09/13/2006	DC Order: Appointment of Counsel		No
	* * * *		
01/16/2007	Appellant Brief Filed: M: 01/31 PT'D Cover page does not comply to 11th Cir. R. 28-1(a), briefs need page numbering to comply with 11th Cir. R. 32-4 (Atty: Scott J. Forster)	Christopher Michael Dean	No

File Date	Entry	Party	Pending
	* * * *		
02/23/07	Appellant Brief Filed: (Atty: Colin Garrett)	Ricardo Curtis Lopez	No
	* * * *		
04/06/2007	Appellee Brief Filed: (Atty: William Gavin Traynor)	United States of America	No
	* * * *		
04/11/2007	Record on Appeal		No
	* * * *		
1/16/2008	Oral Argument Scheduled: 01/16/08		No
01/23/2008	Colin Garrett argued for Appellant; Scott J. Forster argued for Appellant; Amy Levin Weil argued for Appellee		No
02/20/2008	Judgement Entered		No
	* * * *		
02/20/2008	Opinion Issued - 06-14971X		No

File Date	Entry	Party	Pending
03/11/2008	Petition for Rehearing En Banc: (Atty: Colin Garrett)	Ricardo Curtis Lopez	No
04/15/2008	The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, the Petition(s) for Rehearing En Banc are DENIED		No
	* * * *		
04/24/2008	CASE CLOSED-Mandate Issued		No
04/24/2008	Mandate Issued		No
04/24/2008	MDT1 (Letter issuing mandate) issued. To: James N. Hatten; c: Amy Levin Weil; c: Colin Garrett; c: Scott J. Forster; c: Stephanie Kearns; c: William Gavin Traynor —		No

File Date	Entry	Party	Pending
	* * * *		
07/21/2008	Notice of Filing Certiorari: sc# 08-5298	Ricardo Curtis Lopez	Yes
07/21/2008	Notice of Filing Certiorari: sc# 08-5274	Christopher Michael Dean	Yes

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

FIRST SUPERSEDING
CRIMINAL INDICTMENT
No. 4:04-CR-0072-HLM

UNITED STATES OF AMERICA

v.

RICARDO CURTIS LOPEZ and
CHRISTOPHER MICHAEL DEAN

THE GRAND JURY CHARGES THAT:

Count One

On or about November 10, 2004, in the Northern District of Georgia, the defendants, RICARDO CURTIS LOPEZ and CHRISTOPHER MICHAEL DEAN, did conspire, combine, confederate, agree, and have a tacit understanding with one another to take and obtain personal property then in the custody and control of AmSouth Bank, a business operating in interstate commerce and which was part of an industry which affects interstate commerce, that property consisting of United States currency, from the persons of, and in the presence of, AmSouth Bank employees, against their will, by means of actual and threatened force, violence, and fear of injury, immediate and future, to the persons of the employees, and by doing said acts did unlawfully obstruct, delay, and interfere with commerce, as that term is defined in Title 18, United States Code,

Section 1951; all in violation of Title 18, United States Code, Section 1951(a).

Count Two

On or about November 10, 2004, in the Northern District of Georgia, the defendants, RICARDO CURTIS LOPEZ and CHRISTOPHER MICHAEL DEAN, aided and abetted by each other, during and in relation to a crime of violence for which they may be prosecuted in a court of the United States, that is, the armed robbery charged in Count One above, did knowingly use, carry and possess and discharge a firearm, that is, a pistol, in violation of Title 18, United States Code, Sections 924(c)(1)(A)(iii) and 2.

A TRUE BILL
/s/ Jerry W. Price
Foreperson

DAVID E. NAHMIAS
UNITED STATES ATTORNEY

/s/ William G. Traynor
WILLIAM G. TRAYNOR
ASSISTANT UNITED STATES ATTORNEY
600 U.S. Courthouse
75 Spring Street, S.W.
Atlanta, GA 30303
404/581-6000
Georgia Bar No. 716634

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

Criminal Docket Number
4:04-CR-72-HLM

Rome, Georgia
Monday, May 1, 2006
10:05 A.M.

UNITED STATES OF AMERICA

v.

RICARDO CURTIS LOPEZ
CHRISTOPHER MICHAEL DEAN

VOLUME 1

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE HAROLD L. MURPHY,
UNITED STATES DISTRICT JUDGE, AND A JURY

* * * *

[2] INDEX OF WITNESSES

Government's:

Jimmy Tanner	Direct	Traynor	8
	Cross	Jones	26
	Cross	Forster	36
	Redirect	Traynor	39
Nora Hall	Direct	Traynor	40
	Cross	Jones	47
	Cross	Forster	50
Rodney Clemones	Direct	Traynor	51
	Cross	Jones	60
	Cross	Forster	64
George Lemming	Direct	Traynor	68
	Cross	Jones	92
	Cross	Forster	102
Perry Maynard	Direct	Traynor	106
Michael Ennis	Direct	Traynor	110
	Cross	Jones	117

* * * *

JIMMY TANNER – DIRECT BY TRAYNOR

[8] If you'll show them out.

(RECESS)

THE COURT: All right. Mr. Traynor, who would you have as your first witness?

MR. TRAYNOR: Your honor, the United States calls Jimmy Tanner.

THE CLERK: Sir, if you will come around to the witness stand, please. If you'll face me and raise your right hand. You solemnly swear the evidence which you're about to give in the cause now before this court

will be the truth, the whole truth, and nothing but the truth, so help you God?

THE WITNESS: I do.

THE CLERK: Be seated, please. Please state your name for the record.

THE WITNESS: Jimmy Tanner.

* * *

JIMMY TANNER, THE GOVERNMENT'S WITNESS, WAS DULY SWORN

DIRECT EXAMINATION OF JIMMY TANNER

BY MR. TRAYNOR:

Q. Mr. Tanner, would you tell the jury what you do for a living?

A. I'm a banker.

Q. And where are you a banker today?

A. Today I'm a banker in Covington, Georgia.

Q. All right. Could I ask you to either pull that [9] microphone back a little bit or scoot up a little bit?

A. That better?

Q. I think so.

A. Okay.

Q. Thank you. How about on November 10, 2004? What did you do for a living?

A. I was a branch manager for AmSouth Bank here in Rome.

Q. All right. What's the address of the location where you were the manager?

A. Martha Berry Highway. I believe the address was 3040 Martha Berry Highway.

Q. And how long did you work at that bank?

A. Approximately two years.

Q. And what did you do as manager?

A. You do a number of things; you wear a number of hats. You do staffing, personnel, scheduling, but you also do outside business calling just to try to make sure you're helping your team reach their goals of deposits and loans and that sort of thing.

Q. Now, Mr. Tanner, was your AmSouth Bank on Martha Berry Highway was it robbed on November 10, 2004?

A. Yes, sir.

Q. Would you—I want you to just tell the jury about the robbery. When did you first see the robbery?

A. It was approximately 10:00. I believe it was a [10] Wednesday, about 10:00 that morning, and I was in my office. And I had gotten up, and I was walking away from my desk to the doorway of my office when someone came in pointing a gun, shouting, and telling us to get down and "give me your money."

Q. All right. How was the person dressed?

A. Dark-hooded sweat shirt with the hood up, dark—I think the—I think the hooded jacket was blue, dark blue. And the mask, it seemed to be black to me. But, anyway, dark-hooded jacket with a dark mask. You could see around the eyes, a little around the mouth. I think he was wearing surgical gloves or something like that. I believe he had on a lighter colored long sleeve t-shirt of some sort, sort of baggy pants. I don't recall the color of the pants. He was sort of smallish in stature. I thought he was a young guy, thin, I think somewhere around 5-8 or so in height, probably about 140 to 150 pounds, somewhere in that neighborhood, was my best guess.

Q. All right. Was there enough space cut out in the mask that you could see his skin color?

A. Yes, sir.

Q. What was his skin color?

A. White.

Q. All right. And how was he—you said he was carrying a pistol?

A. Yes.

[11] Q. And how was he carrying it?

A. In right hand. It was not a big pistol, but it could—it was scary all the same.

Q. All right. So, he came in and told everybody to get on the ground?

A. Yes.

Q. And what did you do?

A. Well, first I guess I was sort of in shock. I mean, that doesn't happen very often in somebody's life I guess, but so I'm standing in the doorway and he pointed at each person, told them to get down. And Melissa in the lobby, she did get down below her desk. The two tellers behind the teller line both got down, and I guess first I was sort of in shock. I still stood in the doorway, and I remained standing through the whole, whole incident.

Q. All right. So, you're in the doorway of your office?

A. Yes.

Q. And when you're standing in the doorway, where are the teller windows?

A. If I'm—the outside door's facing here, my doorway is facing the outside door. The teller line was to my left. And the head teller, Nora Hall, was in the front teller window, and April Malcolm was in the drive-thru, which was behind Nora .

Q. So, when you're standing in your doorway coming out of [12] your office, you're looking at the doors that the robber comes in, came in?

A. Yes.

Q. Okay. So, he came in, he's dressed in the baggy, hooded clothes, he's got the pistol, tells everybody to get down. Did you stay standing?

A. Yes.

Q. Okay. What did you see him do after he told everybody to get down?

A. After he told everyone to get down, he proceeded to try to get behind the teller line. There's a little gate, if you will, that is latched and locked, and that's the way you enter in behind the teller stations. And he proceeded to try to get in behind there, but he had some difficulties opening that gate, and I'm familiar with that since I did that on a regular basis. At times you have to reach over and unlock it and undo the latch. So, he had little difficulties there, but he got behind there. Then he proceeded to go through the teller the drive-thru station, again pointing a gun at April, telling her to get down on the ground, and he reached over in her drawer and got money out of her drawer.

Q. Did he put the money in anything?

A. I don't recall that he did.

Q. All right. And you're gesturing with your right-hand. Is that the hand he had his gun, the gun, in?

[13] A. Yes, sir.

Q. Okay. So, he takes the money from the drive-thru, and you're still standing there?

A. Yes, sir.

Q. Okay. What does he do after that?

A. He turned around then and faced Nora. Nora's the head teller. She was down on her knees, down below the station. He proceeded to go to her window, and while standing over her, he was reaching with one hand to get the money and had the gun in the other hand. So, he was leaning over Nora. Nora was right in front of him on her knees, her back faced to

him. And reaching in the teller window, getting the money, and when he did, the gun went off.

Q. All right. Did he still have the gun in his right hand when it went off?

A. Yes.

Q. Okay. And what happened after the gun went off?

A. Well, he cursed because it sounded like that was a surprise, but he then got what he could and proceeded to leave.

Q. And how did he leave?

A. The same way he came in: went out the swinging gate and then out the door.

Q. And then when he ran out of the bank, what did you do?

A. Immediately went to the window. There's a large window [14] probably five feet in height on the opposite wall, the same wall that he went out. So, immediately went to that window to see if I could get a description of the vehicle, a tag or something. It was a silver Taurus, a newer model, no plates. It was —they had been taken off. But it looked like a new vehicle or relatively new vehicle, and it left the parking lot and took a left. I don't remember the road.

Q. Okay. Did you see how many people were in the Taurus?

A. No, I can't say. It happened so fast. And when he got in the vehicle, they were gone so fast I—no, I can't tell you I saw a driver, but I know there was one. It just—there's no way he could have done all he did and got in the car and driven off.

Q. Okay. But you only saw one person driving away?

A. I didn't see a driver.

Q. Okay. You didn't see a driver, okay. Do you know how much was taken in the robbery?

A. 300 $3,642, if I'm not mistaken.

Q. And did the—did your AmSouth location use dye packs?

A. We did, yes, sir.

Q. Would you explain to the jury what a dye pack is?

A. It's a device used to help or assist in these kind of instances. The dye pack will—if properly installed and triggered, it will explode and help you to locate—you know, first of all, help deter these sort of things but also help [15] you locate the funds, maybe help you locate the folks that have taken the money.

Q. And how does—how are the dye packs—where are the dye packs?

A. Dye packs are located in the—each teller window, each teller station, and usually attached to you know, sort of disguised, if you will, in the money. And when they're taken, again, they're usually activated by something installed in the building, and when you leave the premises, if you take that and you leave the premises, usually it will explode or go off. The unfortunate thing in our case was: a week previously we had someone run into the side of the building and we had to do some remodeling because the vehicle ran into the building, and so in the course of reinstalling the equipment, apparently it wasn't installed properly or, regardless, the dye packs did not go off, it's my understanding.

Q. So, the dye packs are triggered by something like a shoplifting device? As you leave the bank, there's kind of an electronic field that triggers it?

A. Yes, sir, something along those lines.

Q. Now, AmSouth bank, your branch was here in Rome. Do you know where AmSouth's headquarters are?

A. Birmingham, Alabama.

Q. And did your bank—you said the robbery happened the robber came in about 10:00. Did your bank remain open for the [16] rest of the day?

A. No, sir. We immediately closed. We remained closed the rest of the day.

Q. All right, Mr. Tanner. I'm going to show you a couple exhibits.

MR. TRAYNOR: Your Honor, may I approach the witness?

THE COURT: Yes, sir.

MR. TRAYNOR: Thank you.

Q. Mr. Tanner, I'm showing you a stack of documents. They're marked United States Exhibits 1 through 6. Why don't you just take a look at those for a minute. Before we start talking about them, I just want to make sure you recognize them. Do you recognize those?

A. Yes, sir.

Q. Okay, let me start with Exhibit 1. That's a collection of three photos. What are those?

A. These are photos of the AmSouth Bank here in Rome, the branch that I managed.

Q. All right. Do those photos fairly and accurately represent what the bank looked like on November 10, 2004?

A. Yes, sir.

Q. Okay. How about Exhibit 2?

A. These are photos of the interior of the bank, in particular, the entranceway to the bank, as well as the

* * * *

[23] A. Correct.

Q. And what are we looking at here?

A. This is Nora Hall's work station. Her—that's her coat and chair, bottom left. And right in front of that coat and chair would be her money, where her money is kept, and that's the drawer where he was reaching into to get the money. And she was on her knees underneath the station there.

Q. All right. So, this is where she was?

A. Yes, sir.

Q. Underneath?

A. Yes, sir.

Q. And then is this the cash drawer over here?

A. Correct.

Q. Okay. I just noticed this little post-it note. What does that signify?

A. If I'm not—it's hard for me to see from this distance, but if I'm not mistaken, that's where the bullet went through, so it really—it shook us all because we couldn't see her head even though I was standing up. She was below the teller window, and I couldn't see her. I could just see him. And when the gun went off, you know, we didn't know what happened. In fact, Melissa in the lobby popped up and said, "oh, my God, has he shot Nora?" And I told her just get down because, again, it was a loud pop, and we couldn't see Nora.

Q. Okay. This is—

[24] A. The better view of the cash drawer.

Q. All right. So, this is her—looks like her chair's been pulled back to take this photo.

A. Yes, sir.

Q. Okay. Now we're sort of closing in on this little red thing here; and this is the hole you're talking about?

A. Yes, sir, it looks like it.

Q. Now let me show you what's been marked—well, has been admitted as Exhibit 4. What are we looking at here?

A. That appears to be the work station to the left of Nora's, and that's thc the bullet went through that partition there, and I believe it may have struck the computer there. So, that's the work station to the left of Nora's.

Q. Okay. On the other side of that little wall?

A. Correct.

Q. Little partition.

A. Yes, sir.

Q. I'm sorry. I'm just repeating what you said.

A. And again it looks like the investigators were there pointing out that's where the bullet penetrated the wall and where it hit.

Q. Now let's look at Exhibit 5. This is 5-a. What are we seeing here?

A. This is the photos [sic] from the surveillance cameras as he entered the building. That's the first thing that we saw.

* * * *

[36] CROSS-EXAMINATION OF JIMMY TANNER

BY MR. FORSTER:

Q. Mr. Tanner, sir, my name's Scott Forster. They asked most of the questions. I get to go last, so I just have a few. You have no question in your own mind that the perpetrator had a problem getting through that one door? I mean, you were talking to get behind into the teller station. You're sure of that, right?

A. Yes, sir. He struggled with that a little bit.

Q. Okay. I mean, it's just not a door you just walk—I mean, you try to intentionally make it difficult to get back behind that counter?

A. Correct.

Q. Okay. Now, when the gun went off, there was an expletive, something along the lines of, "oh, shoot," or something along those lines, right?

A. Close, yes, sir.

Q. It struck you—I mean, did it strike you that it was a shock to the defendant, the perpetrator, when that gun went off based upon what you heard and what you saw? It wasn't expected; would you agree with that?

A. I'd agree with that.

Q. Okay. Now, you believe that well, you did not see two people in the car?

A. No, sir, I did not.

[37] Q. That's true, okay. Now, you talked about what was her name? Now, Nora Hall, you said she got down under her station, right?

A. Yes, sir.

Q. Did the drive-thru teller—what did the drive-thru teller do?

A. She also got down on her knees when he told her to get down.

Q. Okay. But you think this whole thing from start to finish took no more than five minutes?

A. I—yes, sir, I think so.

Q. Okay. Is it safe to say that time is a little bit of a strange concept when there's a gun being pointed at you?

A. Yes, sir. We're trying to at that moment you're trying to, you know, make sure you see what's going on, remember what's going on, and just do the right thing at that moment.

Q. Now, you spoke after this happened to either Agent Reed or Agent Connolly or both of them, the FBI folks.

A. Yes, sir.

Q. Spoke to them, right?

A. Yes, sir.

Q. And did you tell them that the focus, your focus, was on the gun? The guy's holding a gun. You're fixated on that gun more than anything else, right? I mean, it's a gun.

* * * *

[40] THE COURT: Thank you, sir.

(WITNESS EXCUSED)

MR. TRAYNOR: Your Honor, the United States is calling Nora Hall.

THE CLERK: Ma'am, if you will come around to the witness stand, please. If you will face me and raise your right hand. You solemnly swear the evidence which you're about to give in the cause now before this court will be the truth, the whole truth, and nothing but the truth, so help you God?,

THE WITNESS: I do.

THE CLERK: Be seated, please, and state your name for the record.

THE WITNESS: Nora Hall.

* * *

NORA HALL, THE GOVERNMENT'S WITNESS, WAS DULY SWORN

DIRECT EXAMINATION OF NORA HALL

BY MR. TRAYNOR:

Q. Miss Hall, would you tell the jury what you do for a living?

A. I'm a teller at AmSouth bank.

Q. And which AmSouth Bank do you—where do you work?

A. The Armuchee office.

Q. Do you know the street address?

A. 3040 Martha Berry Highway.

[41] Q. And that's on the road to Summerville?

A. Yes.

Q. Now, Miss Hall, were you working on November 10, 2004?

A. Yes, sir.

Q. And were you robbed that morning?

A. Yes, sir.

Q. Now, when—if we could back up a second. I'm sorry. At the AmSouth where you worked, how many teller windows were there? Are you still there?

A. Yes, I am.

Q. Okay. How many teller windows are there?

A. There's a total of four. There was only two tellers there that day.

Q. And the four teller windows, does that include the drive-thru?

A. Yes.

Q. Okay. So, there are three teller windows that face the lobby?

A. Three inside, yes.

Q. And then if you're sitting at your desk, which one did you have?

A. The middle one.

Q. Okay. As you're sitting at your window looking in the lobby, where's the drive-thru window?

A. Behind me.

[42] Q. Right behind you. Now, on the morning of the 10th, you said there were just two tellers. There's you in the middle?

A. Yes, sir.

Q. And then who else was there?

A. April Malcolm.

Q. Okay. Where was she?

A. She was in the drive-thru.

Q. Okay. So, she's right behind you?

A. Right.

Q. All right. Why don't you I just want you to tell the jury what happened in the robbery. Why don't you start with: when did you first see the robber?

A. As he came in the door and

Q. Did he say anything?

A. Yeah. He was waving a gun and yelling, "everybody get down, give me all your money, everybody get down." So, I got—

Q. What did you do?

A. I got down.

Q. Okay. Where did you what did you do?

A. I kind of got down under my teller window.

Q. All right. And then did you ever see the robber?

A. Just as he came in the door. And then my chair was kind of between me and him, so I really didn't get a good look at him.

[43] Q. All right. So, and what door are you talking about? You said you saw him come in the door?

A. The front door when he first came in.

Q. All right. So, you saw him come in, and you drop down behind your window. Did you crawl in underneath it?

A. Yes, sir, as far as I could get.

Q. Okay. Now, did the teller did the robber ever come up to your window?

A. Yes, sir.

Q. And how did he approach your window?

A. Well, he came around, and I could hear him rattling the door that comes back behind the teller area. And then I saw him go to the drive-thru, and he was in there for—I don't know—a little bit, and then he turned around and came to my window.

Q. All right. When you're under your station, which direction were you looking?

A. Oh, probably more to my left.

Q. Okay. So, I mean, you're not looking just straight at the wall?

A. No, no. The alarm button's on my left, and I'm punching the alarm button.

Q. All right. Could you see him over here in the drive-thru area?

A. Just his feet.

[44] Q. And then he came to your window?

A. Right.

Q. And before you said you heard him rattling around with the door.

A. Yes.

Q. Would you explain that to the jury, please?

A. There's a—well, we have a different lock now, but there was a little lock that you had to reach down underneath and press up to get the door open, and I guess he had to fumble with that to figure out how to get it unlocked.

Q. All right. Did you see him do that?

A. No, I didn't.

Q. Why do you think he fumbled with it?

A. Because I could hear it rattling and—

Q. Okay. So, you're—but eventually he gets the door open?

A. Right.

Q. All right. And then you see his feet over at the drive-thru area; and then what happens when he comes to your area?

A. He opens the top drawer and starts taking money and he—

Q. What hand is he getting money with?

A. With his left hand. And best I could tell, the gun was kind of on the edge of the teller drawer, and

the gun went off. It discharged while he was taking my money.

[45] Q. All right. How far was the gun from your face?

A. I don't know. Too close.

Q. Okay. What happened after the gun fired?

A. He left. He went out.

Q. Okay. Did you see him get away?

A. I did not.

Q. You stayed behind, behind your table there?

A. Right. Well, I stayed behind the window, yeah.

Q. I'm going to show you what's been introduced into evidence as Exhibit 3. Actually, let me show you two Your Honor, may I approach the witness?

THE COURT: Oh, yes.

Q. Let me show you 2 and 3 while the machine's warming up. Do you recognize 2? 2 is a collection of two photos that's on top.

A. Yes. The one on top is the door going into the teller area.

Q. All right, there's a red circle on that.

A. That's the—

Q. Is that the latch you were talking about?

A. Yes, it is.

Q. All right. And then why don't you take a look at the other set of five photos?

A. That's my teller window with I guess the—the second window is where the drawer is open, and then there's bullet

* * * *

[53] Q. All right. And what did you do when you heard the radio call about well, where were you when you first heard about the bank robbery?

A. I was in my sector on Highway 20 out in off Alabama Highway.

Q. How far do you think you were from the bank?

A. As far as time-wise, approximately, running Code 1, which is emergency, 15 minutes. Distance-wise, I would say approximately 15 miles.

Q. And what did you do when you heard the call about the bank robbery?

A. I responded to the area that the bank robbery where it took place.

Q. Now, did you go to the bank?

A. No, I did not.

Q. What did you do?

A. I just started combing the area, checking like motels. A lot of motels in the area off 27 North. The mall, convenience stores, anywhere possibly that the vehicle could be at or maybe the suspects had abandoned the car at.

Q. Had you been told what car to look for or what kind of car to look for?

A. Yes, I did.

Q. And what were you told to look for?

A. It was a silver color Ford Taurus, and it had a drive-out [54] tag on the rear of the vehicle.

Q. And what is a drive-out tag?

A. What is a drive-out tag?

Q. For any jurors that wouldn't know that term.

A. It's a tag. Sometimes when a car is at a used car lot, or even a new car lot, they issue a paper or plastic tag indicating the dealership that it's at until a person purchases the vehicle and a hard tag's applied to it.

Q. All right. So, you didn't see the robber get away in the silver Taurus?

A. No, I did not.

Q. Didn't know what year it was, but basically that's what you were told to look for?

A. Correct.

Q. And did you ever see a silver Taurus that morning?

A. Yes, I did.

Q. Where did you see it?

A. I had went 27 north, turned left back onto Old Summerville Road, headed back south. And approximately I'd say halfway down Old Summerville Road there's an apartment complex. It's called the Oak Villa Apartments. As I was going by, I looked to my right and observed a silver vehicle, which in my mind I had it being similar to a Ford Taurus, sitting at the very end position to the right at the end of the apartment complex, and I proceeded down, turned around, [55] and come back to check it out further.

Q. All right. Did you drive by the apartment complex before you had time to stop?

A. Yes, I did.

Q. Okay. Did you turn around immediately or pretty soon thereafter?

A. Just enough time to finally turn around. I turned around and I went back.

Q. All right. What did you do after you turned around?

A. When I turned around, I turned into the apartment complex.

Go back a second. When I first went by the first time, saw the vehicle, I observed a person walking towards that area that was like halfway in between Old Summerville Road and the vehicle. When I went back and turned around, this person, being a white male, had got closer to the vehicle, and I approached the vehicle in my patrol unit.

Q. All right. And did you—how close did you come up to the Taurus or to the vehicle you were looking at?

A. I pulled directly behind the vehicle, positioned my car to the right of the Taurus.

Q. All right. So, it turned out to be a silver Ford Taurus?

A. Yes, it did.

Q. And how about this—you saw a white male walking toward the Taurus. Where was he when you got out of your car?

[56] A. The closer I got to the Ford Taurus before I was able to park, he had went to the front of the vehicle and went to the driver's side. And about the same time he looked up and saw me, he stepped away. That's when I exited my patrol unit.

Q. All right. Was he carrying anything?

A. He had a white wash cloth, small towel in his hand.

Q. And how was he dressed?

A. As I can recall, just casual clothes, T-shirt. I'm not sure if pants or shorts.

Q. All right. Did you say anything to him when you got out of your car?

A. When I first got out, he had walked to an area that's to the left of the apartments. It looked—appeared to be a basketball area. And I called for him to come back to where I was at, and he did.

Q. Did you ask him his name?

A. Yes, I did.

Q. And what did he tell you?

A. Chris Dean.

Q. And what else did you ask him, if anything?

A. I asked him why he was looking in the vehicle, and his response was he was checking it out because it was a nice vehicle.

Q. Did you ask him about the towel?

A. No, I did not.

[57] Q. Did you ask him where he lived?

A. Yes, I did.

Q. And what did he tell you?

A. He gave from recollection, I can't—I want to say it's 400 block of Old Summerville Road, the Hidden Glen Apartments, which was directly across from where I was at at the Oak Villa.

Q. All right. How wide is Summerville Road there where you're at the Oak Villa apartments?

A. How wide is the road?

Q. Two-lane, four-lane?

A. Two-lane road.

Q. All right. And the Oak Villa Apartments are on one side?

A. Correct.

Q. And as you're driving south, the Oak Villa Apartments are on your right?

A. Correct.

Q. And I'm sorry because I just saw you—you said you turned that way, so you turned to your right and saw the Taurus.

A. When I first saw the Taurus, I was headed south, and the Oak Villa Apartments are on my right.

Q. And where are the duplexes where Mr. Dean said he lived?

A. They were on the left, directly across from the Oak Villa. So, from where I was at at the where the Ford [58] Taurus was at, you can look directly across the street and see the Hidden Glen Apartments.

Q. All right. Did you ever—well, what else did you do after you learned that from Mr. Dean, where he lived?

A. At that time I got the information where he lived at, I notified other officers that they needed to go to this location and secure it till we could find out further about Mr. Dean.

Q. Did you ever do anything with the Ford to with the Taurus? Did you—were you able to run a tag

or the vehicle identification number or something to figure out whose car that was?

A. Yes, I was. Once I had to get out of the vehicle rather quickly and confront Mr. Dean. There was no drive-out tag on the vehicle, which the description was it had a drive-out, so to confirm that this possibly was the stolen vehicle while Mr. Dean was in front of me, I checked the V-I-N on the vehicle. And it come back 1099, which is stolen. And it was given to me the information that it was the vehicle that was involved in the armed or the bank robbery.

Q. All right. About what time was it when you saw the Taurus and had your encounter with Mr. Dean?

A. It was roughly a little after 11:00. I think possibly I pulled up 11:04, 11:05, gave the information out, come back shortly thereafterwards.

[59] Q. All right. You said—did you say Mr. Dean said he was going to play basketball?

A. Yes, he did. He I asked him what he was doing. He said he was about to play basketball.

Q. Okay. Did he have a basketball with him?

A. No, he did not.

Q. Did you see one in the area?

A. No. Just give him the benefit of the doubt. Once other officers got there, we checked around the court, around the apartments. There was a little wooded area, and there was no basketball.

Q. Okay. Now, you talked to Mr. Dean; you called the other officers. Did you go to the duplex yourself?

A. I stood by the Ford Taurus until a wrecker come and towed the vehicle in. Once all that was taken care of, I went across the street. Mr. Dean was in the I believe the back seat of my vehicle. I pulled across to the Hidden Glen Apartments.

Q. Okay. Do you see Mr. Dean in the courtroom today?

A. Yes, I do.

Q. Okay. And why don't you describe him for the jury, please.

A. He's sitting in a blue oxford with his sleeves rolled up, sitting next to his attorney to the right.

MR. TRAYNOR: Okay. Thank you, Officer Clemones.

* * * *

[71] A. Yes, sir.

Q. So, Mr. Dean—did you talk to Mr. Dean then?

A. No, sir, I did not.

Q. And you said you stayed there for a few minutes, so where did you go after that?

A. We got directions to go across the street to the apartments, Hidden Glen Apartments, directly across the street from the apartments where the car was found, that there was possibly another suspect over there.

Q. All right. So, you're in the Oak Villa Apartments?

A. Right.

Q. And what do they look like?

A. They're a two-story apartment. The apartments, the Hidden Glen Apartments, are a single story duplex.

Q. And did you have an address you were going to at the Hidden—

A. I believe it was 692, is where we were going, across the street to Hidden Glen.

Q. And how far is 692 Hidden Glen from where you were standing at the Taurus?

A. You come out of one driveway and go right into the other one. It's just right across the street.

Q. All right. Did you go to 692?

A. Yes, sir, I did.

Q. Did you go by yourself?

[72] A. No, sir. An Officer Adams, Jesse Adams, went with me along with a there was a whole host of other officers from other agencies there, city police, sheriff's department, a lot of people, and we converged on that one apartment over there and surrounded it.

Q. All right. Describe the scene for the jury. You see all these law enforcement cars. Did anyone have their blue lights on?

A. No, sir, we didn't have any blue lights on. There was no sense in running emergency at that point, but we did go over there rather quickly.

Q. And how many cars went from the Taurus over to the 692?

A. Probably four to six cars. And then once we got there, we had more cars come into our area.

Q. And were all these marked units?

A. Yes, sir.

Q. And any marked units, they have blue lights and they're

A. They have blue lights and the markings on the doors and the trunk.

Q. When you got to 692, you said it's a single level duplex?

A. Right.

Q. And you're there with other officers?

A. Right.

Q. And what did you do?

[73] A. I made sure that the whole apartment was surrounded. My car was parked around towards the back, and I went around with Officer Adams and David Hightower with the city police to the front of the apartment.

Q. Did you walk to the front door?

A. Walked up to the front door. And also there was a double set of windows there to the right of the door, and I looked in there because Officer Johnson said that he had seen somebody running in the apartment. The blinds were open.

Q. All right. When you looked in the window, what did you see?

A. There was a TV backed up to the window sill, and there was a big pile of money there. There were some of it that was loose; some of it was banded.

Q. What do you mean, "banded"?

A. Like a bank band.

Q. Sitting on top of the TV?

A. Yes, sir.

Q. Do you have any idea how large this pile was?

A. About the size of a football. It was a big, big pile of it.

Q. So, you see the money in the window; you're investigating a bank robbery. What did you do?

A. Well, we were going to watch that evidence, and we radioed that back to the—to Captain Brock that we saw the [74] money there. I think one of the FBI agents was either there on the scene with them or on the NEXTEL or something—I'm not sure—across the street at Oak Villa Apartments, and we were told that a search warrant was on the way or they were going to secure a search warrant. So, we stayed there to maintain security there for the apartment.

Q. All right. Did you ever go into the apartment?

A. Later.

Q. All right. When's the first time you went into that apartment?

A. We were standing there at the window, and I—and we did not know if the person in there was armed or how they were armed or anything else, so I sent Officer Adams around the trunk of my car to get my assault rifle. And the money was on the TV at that point. I was standing at the door.

Jesse went around to my car and got my assault rifle and my flashlight and brought it back. And when he brought it back, I told him, I said, "look in the window, make sure the money's still there," and he said, "the money's gone."

Q. All right. You said Officer Adams, Jesse?

A. Yes, sir.

Q. This is Officer Jesse Adams?

A. Yes, sir. He works for me, yes, sir.

Q. All right. So, you sent him to your car, which was behind the duplex?

[75] A. Behind the—behind the apartment.

Q. To get your assault rifle?

A. Right.

Q. And then when he came back, the money was gone?

A. The money was gone. This took maybe two minutes.

Q. So, what did you do when you learned that?

A. We radioed that to Captain Brock across the street to let him know that the money was had been moved. There was one $5 bill left on top of the TV. Officer Adams then conveyed to me that he smelled smoke. I was eight to 10 foot from him back up there towards the door, and he said, "I smell smoke." So, we also radioed that to him. We were afraid that they were destroying the evidence, that the money had been moved, and we were told at that point to make entry into the house.

Q. All right. How did you make entry into

A. I kicked the door in.

Q. All right. And once you kicked the door in, who goes in the duplex?

A. I went in first, Officer Adams was behind me, Captain David Hightower was behind him, and Sergeant Mike Tyson with the city police was behind him.

Q. And what did you do once you got to the duplex?

A. Once we got in there, we entered the living room first. And then it goes into the kitchen. And I heard some movement off to the right where there's two bedrooms and a bathroom, [76] and one particular bedroom I heard the movement. So, I went to that door of the bedroom and I stuck my assault rifle around the door and I said, "okay, we hear you in there. I want you to come to me." And then I saw two pair of hands come out from around the corner, and I said, "crawl to me." And that would be Mr. Lopez, and he started crawling to me.

Then I heard another noise like there was someone else in there, so I reached and got Mr. Lopez by the pants or belt or something. I pulled him past me to Officer Adams, and I went in the room to clear it. And there was nobody else in there, but what had happened, the mattress had fallen.

Q. All right. The whole bed or just the mattress or—

A. Just the mattress and box spring, and it was up against the wall.

Q. All right. When you got in—when you walked into the room, where was it?

A. The mattress had actually fallen to the floor.

Q. Was there anybody else in the room?

A. No, sir.

Q. Did you search it at that time?

A. I just did a search for just a human, and that's all. There was no other human in there.

Q. All right. Once you got Mr. Lopez out of the duplex did you find anybody else in there?

A. No, sir.

[77] Q. What did you do after you cleared the duplex?

A. We went back outside and we put Mr. Lopez in the car, and we were waiting on the search warrant, the federal agents to bring a search warrant.

Q. Did you close the duplex door and seal it up?

A. It wouldn't close. It

Q. All right, okay. But you stationed somebody there so no one would be going into the apartment?

A. We stayed right there, and nobody had left their post. Nobody went in or out.

Q. Okay. So, you kept the duplex secured. And what happened with did you say anything to Mr. Lopez?

A. Whenever I went in and cleared the room, they were handcuffing him, and he was raising Cain in there on the floor while they were handcuffing him. And I immediately gave him his Miranda warning as I remembered it without my my card was in the car, and I gave him his Miranda warning. Then we took him to the car. And he was cussing, raising Cain, saying we shouldn't have done what we did and he hadn't done anything wrong and just you know, we went ahead and just put him in the car.

Q. All right. When you say you gave him Miranda warnings, you didn't have your card with you?

A. No, sir. I just went on memory with it.

Q. Okay. You've been in law enforcement 34 years?

* * * *

[81] but and he took us on up there and showed us where he had he had taken some of the evidence and put it in the woods.

Q. All right. Did you find any evidence that afternoon?

A. No, sir, we did not. We didn't find anything as he pointed out to us, nothing.

Q. Now, we sort of jumped in time. You saw Mr. Lopez, got him out of the duplex, then he drives away. Someone takes him away, and then you stay in the duplex?

A. Right.

Q. And then later you meet him out on the CCC road?

A. Right.

Q. All right. Let's talk about the time in between. Once Mr. Lopez is taken away, what did you do?

A. We stayed there until the search warrant arrived.

Q. And what—you eventually got a search warrant?

A. The search warrant arrived with the other officers, and then we made entry into the apartment to do the conduct conduct the search.

Q. Describe for the jury how you searched the apartment.

A. We took it room by room. We started with the living room and just went straight from the living room into the kitchen, into the bedrooms, the bathroom, just searched the entire apartment.

Q. When you go into a room, for people who have—to conduct a search of an area, and let's say you find something [82] you think might be evidence, something you're interested in, what do you do with it?

A. You're going to take pictures of it and you're going to make note of the date and time and who found it and keep an evidence log at that point.

Q. And then does one officer sort of end up as a custodian?

A. Usually, there's an evidence custodian that takes care of everything. He logs down who found it, where they found it, what they found, description of it, stuff like that.

Q. And was that done at this search of the duplex?

A. Yes, yes.

Q. I'm going to show you some things that have been marked for identification. Okay, Captain Lemming. I'm going to show you what's been marked for identification as United States Exhibits 7, 8, 9, 10, 11, and 12. Why don't you flip through those and see if you recognize those, please.

A. Yes, sir, I do.

Q. Okay. What's Exhibit 7?

A. 7 is the picture of the front of the apartment duplex.

Q. All right. Is that how it looked on November 10, 2004?

A. Yes, sir. Yes, sir.

Q. Okay. What is Exhibit 8?

A. 8 would be the gray sweat shirt that was hanging on the doorjamb in between the living room and the kitchen.

Q. All right. And those photos, two photos, in Exhibit 8, [83] is that what the inside of the duplex looked like when you searched it that day?

A. Yes, yes.

Q. Okay. And how about Exhibit 9 is a set of five photos. What do those show?

A. Exhibit 9, the first one is the bedroom in which Mr. Lopez came out of. It's got the mattress and box spring against the wall. It also has a gun and a—and a plastic bag over here. Got another picture with a gun that we recovered, the plastic bag, and the bullets. We've got a cartridge that's not been shot laying down there, and then a picture of another one that was back over there under the mattress.

Q. All right, Exhibit 10 is a set of two photos. What are those?

A. That's a picture of the pants, the blue pants, that was found also in the bedroom that we found the money in. Then the next picture is actually someone pulling money out of the pants pocket.

Q. All right. Exhibit 11 is three photos?

A. Yes, sir. There's another gray sweat shirt on the dryer, and also down in one of the pockets was a toboggan. And then the second picture is just a continuation of the first that shows the U.S. Polo Association logo on the front of the sweat shirt. And then when we pulled the toboggan out of the [84] pocket, that's a picture of the black toboggan.

Q. All right. How about Exhibit 12? That's a collection of six photos. What does that show?

A. This is the back of the duplex, where there was probably seven or eight garbage bags on top of them, one being a blue Wal-Mart bag that we found later that was containing keys to a—some cars and stuff that was taken in a burglary earlier from Jack's Auto Sales. There's a Jack's Auto Sales picture of a drive-out tag here. Also some keys that were taken from different vehicles, one of them being a Nissan Altima, burgundy in color; a Pontiac Vibe, silver in color; and a Ford Explorer, blue in color; all with the little yellow tag from the car lot.

Q. All right. And all those exhibits, 7 through 12, do they all fairly and accurately represent what the interior of the duplex looked like on the afternoon of November 10, 2004, when you searched it?

A. Yes, sir.

MR. TRAYNOR: Your honor, we'd move for admission of Exhibits 7, 8, 9, 10, 11, and 12.

MR. JONES: No objection, sir.

MR. FORSTER: No objection, your honor.

THE COURT: They're admitted.

Q. All right, Captain Lemming. If you would hand those to me, please. Thank you. Let's start with Exhibit 7.

* * * *

[87] Q. All right. So, in this photo, someone has taken the mattress and box spring, picked them back up and leaned them against the wall?

A. Yes, yes.

Q. All right. What are we looking at here?

A. That is a towel, a white towel I believe, and also the you can see right there beside the right side of the towel you can see the edge of the barrel of a gun and the trigger assembly on the gun, and also a black plastic bag laying there with it.

Q. All right. This is the third photo in Exhibit 9. What are we looking at?

A. That would be the actual gun I was just describing and also a box of shells that we found once we moved the bag.

Q. All right. You found all this when you were searching the bedroom?

A. Yes.

Q. And what—were you able to determine what caliber the gun is?

A. .22 caliber.

Q. Okay. And how about these shells?

A. They were .22 caliber.

Q. What are we looking at here?

A. That would be a spent casing, meaning the bullet had already been shot out of the casing, that was found beside the [88] box spring.

Q. All right. That's this object right here?

A. Yes.

Q. That's the .22 round, but the bullet's been fired?

A. Right.

Q. Now, what is this?

A. That's a another casing. I believe that's actually a complete bullet that was behind the mattress.

Q. Now, once you—when you find the pistol or you find the box of ammo or these extra rounds or the spent casing, what did you do with them?

A. I didn't bother them. I left them right there to let the evidence custodian pick them up and

Q. All right. Who's the evidence custodian then?

A. Perry Maynard. He works with us.

Q. All right, this is Exhibit 10. What are we looking at here?

A. That's a pair of dark blue shorts that we found also in the bedroom there that were laying there with the gun, and they had quite a bit of money in it.

Q. All right, this is the second photo in Exhibit 10.

A. That was some of the money that was taken out of the pockets of the pants.

Q. Do you know how much money was taken out? Do you remember how much money was taken out of the pants?

[89] A. We recovered $1,037 in different denominations: twenties, tens, fives.

THE COURT: When you talk about the pants, are you talking about the shorts?

THE WITNESS: Yes, sir. The shorts, yes, sir.

Q. The blue pants, you found those?

A. Yeah, in the bedroom which Mr. Lopez come out of.

Q. Okay. What are we looking at here for Exhibit 11?

A. This is in the wash room area back there on the back side of the kitchen next to the back door. There is the another blue sweat shirt, and then in that pocket you can see the toboggan.

Q. Okay. Right here you're talking about?

A. Right, right.

Q. Sort of a knit ski cap?

A. Sir?

Q. A knit ski cap

A. Yeah.

Q. or toboggan?

A. Yeah.

Q. This is the same sweat shirt?

A. That's the same thing; it's just folded open. You can see U.S. Polo Association on it.

Q. And the last set of photos is Exhibit 12. What are we looking at here?

* * * *

[106] PERRY MAYNARD, THE GOVERNMENT'S WITNESS, WAS DULY SWORN

DIRECT EXAMINATION OF PERRY MAYNARD

BY MR. TRAYNOR:

Q. Sir, would you tell the jury what you do for a living?

A. I'm with the Floyd County Police Department.

Q. And how long have you been with the Floyd County Police Department?

A. 33 years.

Q. What's your rank?

A. Sergeant.

Q. And what do you do now for the Floyd County Police Department?

A. I'm in the Investigations Division, do crime scenes and evidence and property control.

Q. All right. On November 10, 2004, did you go to the AmSouth Bank on Martha Berry Highway?

A. I did.

Q. Let me show you what's been introduced in evidence as Exhibits 3 and 4. They're both collections of photos. Do you recognize those?

A. Yes, I do.

Q. How do you recognize those?

A. These are some photos I made of the interior of the bank that day.

Q. Okay. So, you went out and processed the bank scene?

[107] A. Yes.

Q. And you took those photos?

A. Yes.

Q. Okay. Can you hand them back to me? Thank you.

So, Exhibit 3 we've heard are photos of Nora Hall's window; and what's the why did you take this picture?

A. That picture shows a defect in the partition on the left side of that teller window.

Q. All right. Right here?

A. Yes.

Q. And what is that?

A. A bullet hole.

Q. And did it go through the partition wall?

A. Yes, it did.

Q. All right. Where did it come out on the other side?

A. It came out the other side of that partition and struck a computer thing that was there and bounced down and landed on the counter.

Q. All right. So, in these photos are you the investigator's pointing. What are they doing here?

A. The pen is pointing to a hole in a piece of paper that's taped up there on the side of the the adjacent window, and it shows where the bullet came through the partition into that teller's station.

Q. All right. Did you find the bullet?

* * * *

[115] Q. let me show you what's been marked for identification as Government Exhibit 13 and 14. Would you take a look at those, please? Do you recognize those?

A. Yes, sir, I do.

Q. And have you looked at them before?

A. Yes, sir.

Q. And how did they come into your possession that you looked at them before?

A. I received these from our evidence control unit, the FBI Laboratory. They were sent in through the Atlanta office of the FBI back in I think it was June of 2005.

Q. What did you do once you received those items?

A. I received this particular firearm, which is marked with my—it's designated my K-1, which is the Exhibit 14. It's a .22 short caliber Rohm revolver, R.J.—excuse me—R.G. 10 model. It's a double action revolver, meaning you can just squeeze the trigger

and fire it, or you can cock back the trigger and fire it. That's single action.

Q. You marked that K-1. That's known 1?

A. That's correct. We always mark our tools in the firearms tool marks unit with a K because we'll be test-firing these to so we'll know what they are. They are questioned bullets or cartridge cases coming from a known item as opposed to this as being a Q-5. This is a questioned item, which is Exhibit 13. This was a bullet fragment that I received that's marked [116] with my initials and the four digits of the laboratory number.

Q. All right. What did you do once you got those items?

A. We test-fired this particular firearm in a water recovery tank. We then take the bullets, the cartridge cases, back to the workbench and intercompare them with the bullet. The bullet from—tested from this particular firearm was intercompared with the Q-5 bullet fragment, Exhibit 13.

Q. And what did you find when you compared the bullet fired from that revolver to the Q-5 item?

A. I found the Q-5 bullet, Exhibit 13, was fired from the barrel of Exhibit 14, my K-1 revolver.

Q. And what makes you think that?

A. I identified it based on its microscopic marks. And you go around you're actually using a comparison microscope, which is actually two microscopes in one. You have your central eye piece with a split screen. You place your questioned items on one stage, your known items on the other, and intercompare them. You can go from land and groove impressions around these bullets and pick out all the microscopic character that that particular barrel has left on the known bullet. The same with the questioned item. Even though it had some mutilation to the nose and

the base, it still had pretty much of its land and grooves intact to where you could identify these marks to the marks with the particular firearm.

[117] Q. So, if I understand your analysis, you found that that Q-5 bullet, Exhibit 13, had been fired out of that revolver, Exhibit 14.

A. That's correct, sir.

MR. TRAYNOR: Thank you, Mr. Ennis.

I have no more questions, Your Honor.

THE COURT: Mr. Jones?

CROSS-EXAMINATION OF MICHAEL ENNIS

BY MR. JONES:

Q. Mr. Ennis, is that—Exhibit 13 and 14, is that how you received those items, in their present plastic state?

A. No, sir.

Q. How did you receive them?

A. I received them packaged in a box. The firearm was separate from the this, but they were not in these little plastic baggies.

Q. Is there any identifying names on either one of those items?

A. My identification names?

Q. No. Coming into your facility, were there any identifying names as to who that gun may have may belong to?

A. There was an incoming communication. They said where they retrieved the firearm, but I don't recall any name.

Q. There's not a Lopez on that, on that firearm anywhere, is

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

Criminal Action File
NO. 4:04-CR-72-HLM

Rome, Georgia
Tuesday, May 2, 2006

UNITED STATES OF AMERICA
Plaintiff,

v.

RICARDO CURTIS LOPEZ (1) and
CHRISTOPHER MICHAEL DEAN (2)
Defendants.

VOLUME 2

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE HAROLD L. MURPHY,
UNITED STATES DISTRICT JUDGE, AND A JURY

* * * *

[2] INDEX

Witness	Page
JESSE ADAMS	
Direct (By Mr. Traynor)	3
Cross (By Mr. Jones)	10
Cross (By Mr. Forster)	17
PETER CONNOLLY	
Direct (By Mr. Traynor)	21
Cross (By Mr. Jones)	49
Cross (By Mr. Forster)	62
Redirect (By Mr. Traynor)	67
Recross (By Mr. Jones)	71
Recross (By Mr. Forster)	73
JENNIFER LUTTMAN	
Direct (By Mr. Traynor)	75
Cross (By Mr. Jones)	93
Cross (By Mr. Forster)	94
DALLAS BATTLE	
Direct (By Mr. Traynor)	98
Cross (By Mr. Jones)	114
Cross (By Mr. Forster)	126
TIM SMITH	
Direct (By Mr. Traynor)	128
Cross (By Mr. Jones)	134
JIM CLUBB	
Direct (By Mr. Traynor)	135
CHARLES REED	
Direct (By Mr. Traynor)	142
Cross (By Mr. Jones)	181
Cross (By Mr. Forster)	205

* * * *

[8] Q. And do you remember what order you went into the apartment?

A. I think Sergeant Lemming went in first, I went behind him, and then it was David Hightower.

Q. What did you do when you went into the duplex?

A. I basically secured the front of the residence, which is I guess the living room area, as they went on back toward another room which is located to the right. As you walk in the door, you turn to the right and then back in the back bedroom area.

Q. Was anyone in the duplex?

A. Yes, sir, there was.

Q. And who was that?

A. Mr. Lopez.

Q. When did you first see Mr. Lopez?

A. When he was handed to me by Sergeant Lemming.

Q. What do you mean, when he was handed to you?

A. Well, he was basically apparently hiding in the bedroom under a mattress, and he kind of just held his arm, brought him out to me and all. He was on the floor, and I retrieved him from the floor.

Q. All right. And what did you do when you encountered Mr. Lopez?

A. I basically secured him by holding his arms and cuffing him.

[9] Q. What happened after you got—was there anybody else in the duplex?

A. At that particular time, I think there was a city officer that came in. I can't recall his name at this time, but there was someone who came in. There was so much going on at that time, I can't recall.

Q. Was Mr. Lopez the only nonlaw enforcement person in the duplex?

A. Yes, that's correct. Mr. Lopez was the only nonofficer in the duplex.

Q. So after you handcuffed Mr. Lopez, what did you do?

A. After I handcuffed him, I started taking him out. And Sergeant Lemming was basically behind him, and he read him his rights.

Q. So you heard Sergeant Lemming advise Mr. Lopez of his Miranda warnings?

A. That's correct.

Q. Did you ask Mr. Lopez any questions?

A. No, I didn't.

Q. Take any statements from him at all?

A. Yes. As we were going outside, he basically stated, I should have just shot it out.

Q. Was that in response to anything you said?

A. No, it wasn't.

Q. All right. So you took Mr. Lopez out of the duplex, and

* * * *

[28] telephone contact with Special Agent Reed who was in the process of interviewing Mr. Lopez.

One thing we were trying to find is where the bullet hole was. We knew a weapon was discharged and we were looking in the area of the middle teller's booth where the gun was apparently fired, and we were in the process of trying to find that bullet hole.

And in that period of time, I'm on the phone talking to Special Agent Reed who is questioning Lopez, and Mr. Lopez advised him that he believes that the weapon was fired into the ceiling.

So we were examining the ceiling of the bank, and then we continued our search and then we found a bullet hole between the partition of the middle teller booth and the one to the immediate left.

Q. All right. Let me show you what's been—

MR. TRAYNOR: Your Honor, may I approach the witness?

THE COURT: Yes.

BY MR TRAYNOR:

Q. Let me show you what's been introduced into evidence as Exhibits 3 and 4. Would you take a look at those?

A. Yes, I recognize these photos.

Q. And what's Exhibit 3?

A. 3 is photographs digital photographs of the middle [29] teller booth, and also reflects a bullet hole in the side partition, the left side partition of that teller booth.

Q. So those show the bullet hole you have been talking about?

A. Yes.

Q. And did you ever find the bullet?

A. Yes, we found it in the teller's booth to the immediate left. It was laying on top of the wooden counter.

Q. Let me show you what has been introduced into evidence as United States Exhibit 13. You can go ahead and open that up, if you—

A. Yes, this is the spent casing—spent round that we found lying on top of the counter.

Q. There is a picture there are some pictures in Exhibit 4 showing it just lying on the counter. What happened to it after you and Sergeant Maynard found it on the counter?

A. Sergeant Maynard picked it up with a pair of tweezers, placed it in this bag here, I initialed it, and then subsequently I took it to the FBI evidence room in Atlanta for storage.

Q. All right. Once Sergeant Maynard gave you the bullet and you put it in the envelope, did you change it or alter it in any way?

A. No, I did not.

* * * *

[135] JIM CLUBB

Being first duly sworn by the Courtroom Deputy, testifies and says as follows:

DIRECT EXAMINATION

BY MR. TRAYNOR:

Q. Mr. Clubb, would you tell the jury what you do for a living?

A. I'm a general manager at a car dealer.

Q. Okay. What car dealer is that?

A. Jack's Auto Sales on Martha Berry Highway.

Q. And where is—on Martha Berry Highway, north of town?

A. 1701, out toward the mall.

Q. And what kind of buildings does Jack's Auto Sales operate out of?

A. It's a converted service station.

Q. Well, what size lot do you have?

A. It's kind of a small lot. Probably 25 cars generally.

Q. The property that we would associate with a service station? It's not a huge lot?

A. No, it's not.

Q. And you said you have up to 25 cars on the lot?

A. From time to time we do. Sometimes more, sometimes less.

Q. All right. Let me take you back now, think about [136] November 10th, 2004. What time of day do you normally get to work?

A. Around 8:30 in the morning.

Q. Okay. How about that day, what time did you get to work?

A. Twenty-five after, 8:30, somewhere around there.

Q. As the general manager, are you the first person to get there?

A. Yes.

Q. So on Wednesday, November 10th, you were the first person to arrive?

A. Correct.

Q. When you got to work that morning, did you notice anything unusual?

A. I noticed there was a car missing from outside that had been previously parked right in front of the building, but I didn't think much about it because we thought it might have been leaving to drive to a sale.

Q. So what car was missing?

A. A 2000 Ford Taurus.

Q. What color was it?

A. Gray, silver.

Q. All right. And it was missing on the morning of Wednesday, the 10th?

A. Correct.

[137] Q. Had it been there the day before?

A. Yes.

Q. And why did you think it might have been missing?

A. Because the owner had indicated he might go to Ohio to a car sale and he was going to drive that car. So I had pulled it directly in front of the building so he had access to it because he usually leaves pretty early.

I knew it was gone when I got there, so I didn't think a whole lot about it at first.

Q. You thought he might have taken the Taurus to Ohio to a car sale?

A. Yes.

Q. All right. When you went inside the building, when you got in your office, did you find anything unusual?

A. Not so much in the office. When I went to the we have a shop area that's connected to the main building. I went in there to open the bay doors as I do every morning.

And I noticed there was a window in the bay broken out and glass on the floor. And where the keys keys are generally on a key board there, and I noticed—because all the pegs are generally full, and there was some keys missing, and the Taurus keys as well were gone.

So I called the owner and asked him did he have the car, where was it, you know, what the deal was.

He said, No, I decided not to go.

[138] At that point in time I knew someone had been in the building and the keys were gone and someone had took the car.

Q. And you said in the bay area you had a key board where you

A. Keep the keys.

Q. Where they are hung up on pegs?

A. Right.

Q. And some of them were missing?

A. Yes.

Q. And then when you called the owner to see if he had taken the Taurus, he had not?

A. He had not.

Q. So what did you do once you realized you had been broken into?

A. Well, I didn't have any electricity, so I had to go nextdoor to use the phone, call 911 and tell them we had a break-in.

Q. You reported a theft to the police?

A. Yes, I did.

Q. Did you tell them anything about the Taurus, did you have any identifying—

A. Yes, I did. We have a file on each car that we have in inventory, and I gave them the information on that car, the serial number.

Q. The vehicle identification number?

[139] A. Yes.

Q. All right. Did you ever hear from the police again?

A. Yes, sir. Sometime that morning, I'm not sure exactly what time it was, maybe a couple hours later, an officer came back by the car lot and informed us they had found our car but that it had been used in a bank robbery.

Q. Did you ever get the car back?

A. We did.

Q. How about the keys that had been stolen from your business, did you ever get those back?

A. We didn't get the keys back to the Taurus. We got—there was three or four other sets of keys that were taken; we did get those back.

Q. All right. Let me show you what's been introduced into evidence as Exhibit 12. It's a collection of photos.

If you will look starting on the third photo, do you recognize that license plate?

A. Yes, I do.

Q. And what is that?

A. That's a drive-out tag for our business, Jack's Auto Sales.

Q. When somebody buys a car, that's what you have on the back of their car?

A. We keep them on the cars until we sell them, and then we put a drive-out date on them because they have thirty days to [140] get the tag.

Q. Why don't you look at the next couple of photos. See if you recognize those car keys?

A. Yes, sir. Those are keys that were taken from our business at the same time the Taurus was stolen.

Q. All right. Let me show you what's been introduced into evidence as Exhibit 21. Do you recognize that?

A. Yes, sir. That's an "as is" form with actually my handwriting on it. We put it in the windows of the cars.

Q. That's for the Taurus?

A. Yes, sir, it is.

Q. That has the VIN number on it?

A. Yes, it does.

Q. And then let me show you what's been introduced into evidence as Exhibit 30. Do you recognize that?

A. Yes, sir, I do. These are the keys to the 2000 Ford Taurus that was stolen.

Q. If we still have the keys to the Taurus, were you ever able to use the Taurus?

A. We had to get Safe Lock & Key to go to the police department and actually cut keys for it so we could pick up the car once they told us it had been released.

MR. TRAYNOR: Okay. Thank you, Mr. Clubb.

No more questions, Your Honor.

THE COURT: Mr. Jones?

* * * *

[170] Q. Now, when you talked to Mr. Dean, did he have anything with him, any kind of documents with him?

A. Mr. Dean came to the interview, he had a copy of I believe the *Rome News Tribune* news article that had been written about the bank robbery I think the following day, November 11 of '04.

Additionally he had a copy of the Floyd County Police Department incident report detailing the robbery.

Q. Now, when you talked to Mr. Dean, did you advise him of his rights?

A. Yes. He was advised of his rights via the same standard FBI advice of rights form which was read to him as he read along.

Q. All right. When you went over the did you go over Mr. Dean's rights with him before you asked him any questions?

A. Yes, I did.

Q. You used the same form we talked about?

A. That's correct, I did.

Q. Did his lawyer look at it?

A. Yes, he did.

Q. Let me show you what's been marked for identification as United States Exhibit 28.

Why don't you take a look at No. 28. Do you recognize. that?

[171] A. Yes, I do.

Q. And what is that?

A. That's a standard FBI advice of rights form that Mr. Dean signed stating he understood his rights and wished to make a statement. That was witnessed by myself and Special Agent Connolly at 2:12 p.m. on April the 12th of 2005.

Q. And again when you talked to Mr.—well, this time when you talked to Mr. Dean, did he seem to understand what you were saying?

A. Yes, he did.

Q. Seemed oriented in time and space?

A. Yes, he did.

Q. Did he seem to be under the influence of any alcohol or drugs?

A. No, he did not.

Q. Did you threaten him in any way if he did not talk to you?

A. No, I did not.

Q. Did you promise him any benefits if he did talk to you?

A. No, I did not.

Q. Was his lawyer there with him the whole time you talked to Mr. Dean?

A. Yes, he was.

Q. All right. What did Mr. Dean tell you?

[172] A. Mr. Dean told myself and Agent Connolly that the night before the bank robbery, he had paid a person who he did not name this person by name but referred to him as a crack head, paid him some amount of cash, was going to pay him five hundred dollars, I believe, to go steal a car so that he could take it to a chop shop to pay a drug debt.

Mr. Dean continued and said that the person that stole the vehicle didn't do a very good job stealing the vehicle, didn't get a very nice vehicle, so he just gave him two hundred dollars, and then was trying to figure out how to make up the money to pay the drug debt that he owed.

Q. Did Mr. Dean say what kind of drug debt he had?

A. He didn't specify as to what type of drug debt. I don't recall the exact amount.

Q. Was it his drug debt alone?

A. If I recall correctly, it was his and Mr. Lopez's drug debt that he owed.

Q. All right. So Mr. Dean and Mr. Lopez have a drug debt. Mr. Dean is doing something with this stolen car. What did he say he did with it?

A. He had went and parked it away from their residence that night before the bank robbery, was trying to figure out what to do because Mr. Dean said that he didn't want to take it to the chop shop owner who he would not name.

Q. Did he tell you where the chop shop was?

[173] A. No, he didn't tell us where it was located or who ran the chop shop. But he was afraid to take it there because the last time that he had taken a car there he was fifty dollars short, and the owner of the chop shop had pulled a gun on him, Mr. Dean.

Q. So he has got the car and now he doesn't want to go to the chop shop. What did he say he did?

A. Mr. Dean said that he was up all night, had watched a movie called *Set It Off*, and then decided that he was going to rob a bank to get the money to pay the drug debt off.

He got up the next morning, and I believe he said that he drove around, he was going to rob another bank down the street, wasn't going to rob the AmSouth Bank to begin with. However, he did go to the AmSouth Bank alone, Mr. Dean said, that Mr. Lopez was not involved in the robbery.

Mr. Dean said that he went to the parking lot of the AmSouth Bank, backed the car in, and went in through the double back doors of the bank.

Q. What did he do once he went in the bank?

A. Mr. Dean said that he went in the bank, told everybody to get on the ground, had the gun waving around. He said that he went to the teller windows in the lobby but that nobody was there.

He said that he went around to the teller door, walked into the teller door.

[174] I asked Mr. Dean if he had any trouble getting through the teller door. Mr. Dean said he had no trouble getting through the teller door, opened it right up and went in.

Q. Why did you ask him that?

A. Because of the statements from witnesses in the bank saying that the bank robber had difficulty getting through the teller door because of the latch and the difficulty in working the latch because you had to reach over.

Mr. Dean said in his statement that there was no problem getting through that door. He went on in.

Went to the drive-thru teller, grabbed some money from there. He said that after that, he turned around to the window where Ms. Hall was stationed at and she had gotten under her desk, and was grabbing more money from there.

He said that he was trying to change hands with the gun and that the gun went off. Mr. Lopez said—or Mr. Dean said he grabbed some more money, made an exclamation, and went out the bank the same way he came in, got in the vehicle and drove home.

Q. Did Mr. Dean say what he did with the money?

A. I do not recall that we got into that at that point. I don't think we discussed what happened with the money.

Q. Did Mr. Dean say anything about the police coming into the duplex?

A. He said that he had I do recall now. He said that he [175] went off over to CCC Road and dumped

the money. I do not recall if he said it was in a creek, but he did say it was off CCC Road.

Mr. Dean said that he had forgotten to wipe down the rear-view mirror of the vehicle, of the Ford Taurus, so he was walking toward the Ford Taurus with a towel to wipe it down when he was stopped by I believe Officer Clemens with the Floyd County Police Department that stopped him. And at that point he was taken into custody.

Q. Did Mr. Dean say anything about counting the bank money or splitting the money up?

A. No. He didn't mention about splitting the money up that I recall.

Q. All right. Did Mr. Dean say anything about—well, let me ask you, did you do a report of your interview with Mr. Dean?

A. I did do a report of the interview with Mr. Dean, and I think I do recall now that while inside the residence, Mr. Dean said that he had taken the weapon into the bedroom, he didn't specify which bedroom, that he had taken the spent casing out of the weapon that he had used in the robbery and replaced it with another round.

And Mr. Dean said that when he replaced that round, that the gun was fully loaded, which meaning that it had six rounds in the cylinder at that point being it was a [176] revolver.

So after that we asked where Mr. Dean had gotten the weapon. Mr. Dean would not give up the would not give us any information as to where he received the weapon, only that it had serial numbers scratched off of it.

Q. All right. So Mr. Dean told you when he finished with the pistol or the revolver, it was fully loaded?

A. That's correct.

Q. And that it had an obliterated serial number?

A. That's correct.

Q. Scratched-off serial number?

A. That's correct.

Q. Now, did Mr. Dean ever tell you why he waited five months to have this talk with you?

A. I do not recall, but I don't believe that he did. I don't believe he gave a specific reason for that.

Q. When you talked to Mr. Dean, did he say anything about having had a job?

A. No, I do not recall.

Q. Did he say where he got the money to pay for the stolen car?

A. No, he did not.

Q. Did he ever say how he ended up owing a drug debt that would drive him to rob a bank?

A. No, he didn't specify as to how they accumulated the

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

Criminal Docket Number
4:04-CR-72-HLM

Rome, Georgia
Wednesday, May 3, 2006
10:35 A.M.

UNITED STATES OF AMERICA

v.

RICARDO CURTIS LOPEZ
CHRISTOPHER MICHAEL DEAN

VOLUME 3

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE HAROLD L. MURPHY,
UNITED STATES DISTRICT JUDGE, AND A JURY

* * * *

[2] INDEX OF WITNESSES

Government's:			
Charles Reed	Direct	Traynor	3
	Cross	Jones	10
	Cross	Forster	15
Defendant's:			
Ricardo Lopez	Direct	Jones	23
	Cross	Forster	43
	Cross	Traynor	60
	Redirect	Jones	77
Christopher Dean	Direct	Forster	83
	Cross	Jones	99
	Cross	Traynor	108
	Redirect	Forster	123

* * * *

[23] MR. JONES: Yes, sir. I call Mr. Lopez to the stand.

THE COURT: All right.

THE CLERK: Sir, if you will come around to the witness stand. If you would raise your right hand. You solemnly swear the evidence which you're about to give in the cause now before this court will be the truth, the whole truth, and nothing but the truth, so help you God?

THE WITNESS: I do.

THE CLERK: Be seated, please, and state your name for the record.

THE WITNESS: Ricardo Curtis Lopez.

* * *

RICARDO LOPEZ, A DEFENDANT HEREIN, WAS DULY SWORN

DIRECT EXAMINATION OF RICARDO LOPEZ

BY MR. JONES:

Q. Mr. Lopez, tell us what happened on the night of November 9th of 2004.

A. That night me, Chris went over to a friend's house across the street from where we lived. We played video games and smoked some marijuana. A couple hours later we returned home to the apartment. We played some more video games and smoked some marijuana. I went to sleep shortly afterwards. I don't know what time it was, but I went to sleep shortly afterwards.

I woke up when my wife got off work. We went to bed. I [24] didn't wake back up till the next morning when she had to get up and go to work. She works at

5:00 in the morning. I got up with her. She got ready for work; she went to work.

Our apartment was messy because my little nephew had been over the day before, so I stayed up cleaning the apartment for a couple hours. After I finished cleaning, I smoked a marijuana cigarette, and by then it's early morning time. I went and woke Chris up, went back into the living room, smoked me another marijuana joint and just sat there. Chris came into the living room. We talked about what we was going to do that day. I told him that I was either going to go to Atlanta, where I was going to go sit with my wife at her store.

Shortly after that, I received a phone call from a friend who said he was coming by. I told him all right, so I went and got in the shower. I got out of the shower. Chris was gone. Nobody was there. So, I finished getting ready. After I got ready, I sat on the couch and just listened to some music, nothing in particular, just to the radio really.

A short while after that, Chris comes busting in the door. I asked him what you know, "what you doing?"

And he told me, "I just robbed a bank."

And I asked him, "why did you do that?"

And he told me. He said he had a drug debt, he didn't have the money to pay it, so he decided to do that. He said [25] that he had a car that he was going to take to a chop shop, but he said that him and the chop shop owner had a had a falling out or some kind of problem; that at one point in time the chop shop owner pulled an assault rifle out on him because

he was $50 short and told him that it wasn't the money, it was the principle of the matter.

MR. TRAYNOR: Your honor, I'm going to object at this point. First, he's not responding to any questions; he's just giving a narrative. Second, I believe as far as to what Mr. Dean says, it's hearsay as far as what Mr. Lopez is testifying about.

THE COURT: I will overrule the objection except to the extent that you are correct. The witness should be questioned rather than a narrative story.

Q. When Mr. Dean showed back—showed back showed up at your house, what was under his arm?

A. He had a wad of money that he was carrying. It was cuffed in the just cuffed against his chest and the inner part of his arm.

Q. Where were you when Mr. Dean showed up at the apartment?

A. I was sitting on the couch in the living room. It's immediately when you come in the door, the couch is right there.

Q. After he showed up with the money in his hand, what happened?

[26] A. I ask him what he's done. I mean, you got to you got to he came in with a wad of money, and that's just something you don't see every day. And I asked him what he'd done, and he told me. He said he robbed a bank.

Q. What bank did he say?

A. AmSouth.

Q. What happened after that?

A. We talked about it. I asked him first I asked him why did he do it, and he told me he had a drug debt.

Q. What was your reaction after that?

A. Well, I ask him for the details of the bank robbery. When he went in the bank, I asked him what happened, how many people was in there, what all took place, what stood out in his mind, and he told me step for step. That's him pulling up, going into the bank, everything.

Q. How many times did you go over this information with Mr. Dean?

A. We went over it twice, and then I asked him specific questions after we finished talking about it. I went back and asked him specific questions to what happened inside the bank.

Q. If this armed robbery occurred around 10:05 to 10:06 November the 10th of 2004, what time did Mr. Dean come back into the—into the residence?

A. I can't say for sure.

Q. How long did your conversation with Mr. Dean and review [27] of all the facts and circumstances how long did that conversation last?

A. Maybe 30 minutes.

Q. After he tells you what happened, what happened, or what did you do then?

A. After he explained the details of the robbery, we started going through the money. He found some little devices that was inside the money. I looked at them, and he was—there was two of them. I looked at one of them and he looked at the other one. I thought they were some kind of tracking devices, some kind—some kind of—some kind, some kind of chips because it had like a little computer a little computer board on it, so it was either chips or tracking devices. We go out the back of our apartment. We go into the woods, and we're throwing them up we're throwing them upside trees, trying to break them. I come back into the house, come back into the apartment. He's got the chips and

Q. Why do you come back into the apartment?

A. Because I get some of thc some of the pepper from what was inside the—what do they call it? The tracking things. There was pepper inside of it. I don't know. I can't remember what they're called.

Q. Okay. Why did you go inside?

A. So, I got the pepper in my eyes from when I was slinging the thing upside the tree. I get the pepper in my eyes. I go [28] back into the apartment, into the kitchen area, and I'm washing out my eyes. He comes back in with the bait bank money and the tracking devices, and he's putting them inside of a bag. I'm washing out my eyes. He comes in there, and he says that he's going to go get rid of the tracking devices. He said that he's going to CCC Road and he's going to get rid of them. He leaves.

Q. When he leaves, what time—what time is it?

A. I can't say for sure what time it is.

Q. Do you wear a watch?

A. No.

Q. Where was the closest clock or time machine in your residence?

A. Probably in the jewelry box in my wife's room. A watch. We don't have no watches—no clocks on the wall.

Q. Can you get what—how much time has passed since he has entered your residence?

A. I'd say a good hour. That's—that would be the best of what I could tell you.

Q. What happens, what happens at that point?

A. He leaves. After he leaves, I'm sitting there, finished washing out my eyes. He's gone, and the gun is sitting on top of the entertainment system in the living room. All right. He asks if he if he wanted me for him to take it and get rid of it. I told him, no,

just to leave it there, so it's [29] sitting on top of the entertainment system. The

Q. Where are the clothes?

A. The clothes, they're the sweater's already hang—already on top of the washing machine in the kitchen area.

Q. Okay.

A. So, after I finish out washing out my eyes, I go to the window 'cuz I'm looking for him. I don't see I don't see him coming back. And then I see police cars going up into the Oak Villa Apartments, Oak Villa Apartments, so by then I'm thinking, "well, they have Chris." That's the only thing I could think of why the police would be over there 'cuz he told me how he had left the car over there. So, by then I take the gun and I go in my bedroom. I'm looking for somewhere to hide it. I mean, not a lot of places, so I just throw it under my bed.

Q. Where's the money?

A. The money, it was when he left, the money was sitting in the living room in a recliner. Before he left, the money was sitting in the living room in a recliner. When he got the dye packs and the bank money, the fake money, I guess he had gotten the original money that wasn't a part of the bank money that didn't have the dye packs in it.

Q. What did you do with the money?

A. There was no money left.

Q. Where was the $1,037?

[30] A. In my pocket.

Q. You've heard testimony it was on top of an entertainment center.

A. No. There was a $5 bill and a cellular phone on top of the entertainment system.

Q. $1,037, whose was that?

A. Mine.

Q. Whose apartment or whose residence is 692 Old Summerville Road?

A. Mine and my wife's.

Q. At that time or still?

A. At that time.

Q. Who is your wife?

A. Jennifer Lopez.

Q. Why is she not here now?

A. Well—

MR. TRAYNOR: Objection, your honor. Relevance.

THE COURT: I sustain the objection.

Q. When did Mr. Dean move into this residence?

A. He moved in I can't give you no specific time, but after he had got out—after he got out of being incarcerated the last time.

Q. When did he move in? Do you remember this is November the 10th of 2004. When did he move into your residence?

A. He moved into the apartment with us when we first moved [31] to the apartment, but there's periods in between that he was locked up.

Q. Okay. Well, why did you tell Special Agent Reed, Detective Battle, anybody else associated with this investigation, that this that you had robbed the bank?

A. I told—I told Mr. Reeds, Mr. Battles, and Connolly I robbed the bank for the simple fact that Chris is younger than I am. He's like a brother to me. I took responsibility for him when he moved into the apartment with me. I made his mother a promise that I'd watch out for him and take care of him. When—he did other things prior to that, but, I mean, it's that's—they were nothing compared to this. When this happened, I knew that if his mother found out that he had did something like this, that she I

mean, her outlook on me would just be nothing because she basically took me in when I had nowhere to go. She helped me, looked after me, and took care of me, so I felt that I owed her the same responsibility with Chris.

Q. There's been evidence about an apology letter that was found behind a marriage certificate. When was that written?

A. The apology letter that I wrote to my wife I had written March of 2004.

Q. Why—how can—why does March 2004 pop out to you?

A. I had went to the jail for driving on a suspended license, and me and my wife had been having problems. She

* * * *

[83] THE CLERK: If you would state your name for the record.

THE WITNESS: Christopher Michael Dean.

* * *

CHRISTOPHER DEAN, A DEFENDANT HEREIN, WAS DULY SWORN

DIRECT EXAMINATION OF CHRISTOPHER DEAN

BY MR. FORSTER:

Q. Pull that mike toward you some or sit up.

A. It won't seem to come up no more.

THE COURT: Just pull the mike. The chair doesn't move.

Q. Okay, pull that mike to you. I'm going to just stand back a little bit talk loud enough for us to hear. What's your name, sir?

A. Christopher Michael Dean.

Q. How old are you?

A. 19.

Q. All right. Now, you understand why we're here, right?

A. Yes, sir.

Q. That you are indicted, been charged with the bank robbery that took place in the AmSouth bank.

A. Yes, sir.

Q. Okay. The first question I want to ask you is this: did you do what you are charged with?

A. Yes, sir.

* * * *

[87] Q. Okay. Now, when you pulled into the bank parking lot, what did you do? And when I say that, relative to: where did you park? Backed in, pulled in? Give me that.

A. At first I didn't even pull in the car parking lot, sir. I drove around the bank a few times around the block to see if it had as much traffic as the other one. I pulled in, backed in, and a red truck pulled through the drive-thru, so I pulled back out, drove around the block another time, drove across the highway on the same road that connects, and parked behind an old warehouse to wait and watch for the car to leave.

Q. Okay. So, when you—then what did you do?

A. I pulled back in—after I decided that there was there was probably no more customers at the bank, I pulled back in, backed up, and went in and robbed the bank.

Q. All right. Now, let's talk about some of the details. You go in the door? What do you see? What do you do?

A. On my left there's a lady sitting at a desk. Directly to her right there was the man, Mr. Tanner, sitting in his standing in his office. To his right there was the teller counters running this way, and

Nora Roberts would have been the one in the middle teller counter. And right directly to my right was the way to get through the—to the drive-thru where the swinging door was.

Q. All right, I want to talk about that swinging door. Now, what did you tell—you were asked in your May statement or [88] your April statement did you have trouble getting through the door. What was your response to that?

A. They misunderstand. They misunderstood. They asked me if I had trouble getting into the bank doors. I said, no, I had no trouble getting into the bank doors. They must have thought that I said I had trouble—no trouble getting through the swinging door. They never specificied—specifi whatever—specified what door they was talking about.

Q. Okay. Did you have a problem getting into the bank itself?

A. No, sir.

Q. Did you have any problem getting behind the teller line?

A. Minor.

Q. I'm sorry?

A. A minor problem.

Q. Tell me what you mean by a minor problem.

A. I had to reach over the swinging door and unlatch the latch and then walk through.

Q. Okay.

A. And step up.

Q. And is that what you did?

A. Yes, sir.

Q. All right. Now, when you got behind the teller line, continue the story. What did you do? What did you see other people do?

[89] A. I went straight into the I went straight into the drive-thru, and the lady was handing me money.

I got the money from her. I went straight to the middle teller counter where Nora Robert was underneath the counter. I got—I started getting money, sticking it in my arm. I went to switch hands with the gun and pulled the trigger. I said, "oh, shit," and left.

Q. What do you mean, put the money in your arm? What do you mean?

A. I never actually—I had a bag, but I never actually put the money into the bag. I always had it in my hand and in my in the cuff of my arm.

Q. In other words, like a—I don't have a—there where I'm putting up under my arm?

A. Something along—

Q. Something like—in other words, it wasn't in the pouch of the sweat shirt?

A. No, sir.

Q. Okay, that's what I meant. Did you ever secure the money, in other words, put it in a bag, put it in your pocket, put it in your pouch? Did you continue like—

A. No, sir, I never secured the money.

Q. Okay, all right. So, you stay in the bank. Now, the gun goes off. Did you take more money after the gun went off?

A. Not that I recall. I do not believe I did.

[90] Q. Okay. So, when the gun went off, what you indicated what you said. What did you do?

A. I ran out, got back into the car. The car door was open. I ran directly to the car, got back in the driver's side, and drove off.

Q. Okay. Now, when you say the car door was open, was it un—when you say open, is it like open or unlocked?

A. It was open, open. I left it open. I didn't shut the car door.

Q. That's what I mean, okay. All right. So, you exit the bank, yes?

A. Yeah.

Q. Okay. Where did you go?

A. I turned left onto Old School—the Old School Road that Mr. Reeds was talking about, turned left onto Old Dalton Road, drove down to Beard Drive that he mentioned, and turned left onto it. About midway through Beard Drive is where I threw the mask and the gloves out.

Q. Okay. Now, what time did you go back to the residence?

A. Yes, sir.

Q. Was that your first stop after you left the bank? You drove out, you threw the mask out, but did you go straight home then?

A. I parked the car and walked straight home, yeah.

* * * *

[98] A. Yes, sir.

Q. Tell me what that is.

A. I got into an altercation with a police officer in the Floyd County Jail.

Q. And what was your sentence?

A. A 20, serve 12.

Q. Okay. So, when you say 20, serve 12, the complete sentence is 20 years. 12 of that's served incarcerated, the remaining eight on probation?

A. Yes, sir.

Q. Okay, okay. Why are you testifying this way?

A. What do you mean?

Q. What compelled you to choose to testify in this case?

A. I felt guilty because I got that man in enough trouble as it is. He told me that Mr. Traynor there

came at him with a 10-year deal, and I told him I couldn't have him going to prison for 10 years for something that he was not guilty of.

Q. So, it's your testimony that you and you alone?

A. Yes, sir.

Q. In other words, it's not an agreement or conspiracy between two folks?

A. No, sir, it's not.

Q. And you understand what I mean when I say the word "conspiracy"? Agreement of more than one.

A. Yes, sir.

* * * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

[Filed May 4, 2006]

FIRST SUPERSEDING
CRIMINAL INDICTMENT
4:04-CR-0072-HLM

UNITED STATES OF AMERICA

v.

CHRISTOPHER MICHAEL DEAN

VERDICT FORM

We the jury find the defendant, CHRISTOPHER MICHAEL DEAN,

Guilty as to Count One
Guilty as to Count Two.

May 4, 2006.

/s/ [Illegible]
Foreman/Forelady

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

Docket No. 4:04-cr-0072

UNITED STATES OF AMERICA

v.

RICARDO CURTIS LOPEZ,
CHRISTOPHER MICHAEL DEAN,
Defendants.

Atlanta, Georgia
August 31, 2006

TRANSCRIPT OF SENTENCING HEARING BEFORE THE HONORABLE HAROLD L. MURPHY, UNITED STATES DISTRICT JUDGE

APPEARANCES OF COUNSEL:

FOR THE GOVERNMENT:

WILLIAM G. TRAYNOR
ASSISTANT U. S. ATTORNEY

FOR THE DEFENDANT LOPEZ:

GILES JONES

FOR THE DEFENDANT DEAN:

SCOTT FORSTER

* * * *

[2] PROCEEDINGS

(Rome, Floyd County, Georgia; August 31, 2006 in Open Court.)

THE CLERK: I'll sound the cases of The United States of America versus Ricardo Curtis Lopez and Christopher Michael Dean.

MR. TRAYNOR: Will Traynor for The United States, your honor.

MR. FORSTER: Scott Forster for Christopher Dean.

MR. JONES: Charles Jones attorney for Ricardo Curtis Lopez.

THE COURT: Is it satisfactory with counsel and the parties that we handle these cases together to the extent appropriate?

MR. FORSTER: That's fine, your honor.

MR. JONES: No objection for Mr. Lopez.

THE COURT: All right. Is that satisfactory with you, Mr. Traynor?

MR. TRAYNOR: Yes, your honor.

THE COURT: Mr. Lopez, have you read this presentence report as prepared by The United States Probation Officer and been over with it your lawyer?

DEFENDANT LOPEZ: Yes, sir.

THE COURT: You understand it fairly well?

DEFENDANT LOPEZ: Yes, sir.

THE COURT: Mr. Dean, have you read the presentence [3] report in your case and been over it with your lawyer?

DEFENDANT DEAN: Yes, sir.

THE COURT: Do you understand it fairly well?

DEFENDANT DEAN: Yes, sir.

THE COURT: The court has reviewed the presentence report as prepared by The United States Probation Officer in the case of The United States against Mr. Lopez, and the court has also reviewed attachments to that presentence report which consist of copies of various appellate court cases, that is, decisions, and also attached to the presentence report is a copy of the indictment in this case, and also is attached a copy of the objections and comments as to the presentence report filed on behalf of Mr. Lopez by Mr. Jones.

The court has also reviewed the addendum to the presentence report as prepared by The United States Probation Officer. The court has further reviewed the findings of fact and conclusions contained in the presentence report as prepared by the United States Probation Officer, and the court makes all of the findings of fact and conclusions contained in the presentence report as to Mr. Lopez the findings of fact and conclusions of the court in all respects except as to unresolved Guideline issues.

The court puts into evidence for the purposes of the record in this case all these documents that I have thus far referred to. Plus, the court has received and reviewed a [4] transcript of a portion of the trial testimony in this case consisting of the testimony of both of the defendants at the trial and the testimony of one of the investigative officers who was a major investigator of this incident, and that is put into the record.

The court has also received from the government its response to the objections filed to the presentence report by Mr. Lopez and by Mr. Dean and that's placed into the record.

In Mr. Dean's case, the court, of course, has reviewed these trial transcripts I've just referred to that were typed up by the court reporter, that is, the testimony at trial of Mr. Lopez and Mr. Dean and the investigative officer that I just identified a moment ago.

The court has reviewed the indictment attached to the presentence report, several cases, appellate court cases attached to the presentence report as to certain issues made as objections to the presentence report.

The court has also reviewed and there is attached to the presentence report the objections of the defendant in somewhat detail to the presentence report. Attached also is the addendum to the presentence report as prepared by The United States Probation Officer and the presentence reported itself.

The court has reviewed all of the findings of fact and conclusions contained in the presentence report prepared by [5] The United States Probation Officer in Mr. Dean's case, and the court adopts all those findings of fact and conclusions as contained in the presentence report and makes those findings of fact and conclusions those of the court in all respects except as to unresolved Guideline issues.

Again, the court notes for the purposes of the record that it has received and reviewed the memorandum in response to defendant's various objections to the presentence report and that is made a part of the record in this case.

The court has reviewed it and has reviewed an Eleventh Circuit unpublished appellate court decision having to do with one of the issues to which each defendant has objected in reference to the presentence report.

So the court puts all of these documents into the record for the purposes of this hearing and any later review of the court's actions in this case.

In Mr. Lopez' case as in Mr. Dean's case, defense counsel has felt at ease to make all objections and criticisms of the presentence report that he thought would be help helpful to his client in any way.

Mr. Lopez objects to the enhancement for obstruction of justice and objects to the conclusion of The United States Probation Officer as to the minimum sentence required, and objects to the criminal history computation as being excessive for charging points for related cases that should not have been [6] charged to this defendant. Mr. Forster carries on the view of Mr. Jones and supplies his list of objections in his client's case.

In Mr. Dean's case, Mr. Forster points out that the probation officer has erred in many respects in imposing a well in not giving any kind of credit for a mitigating role. He complains that the probation officer has found and suggested that his client obstructed justice.

He thinks that his client is improperly being denied acceptance of responsibility. He disagrees with the minimum sentence suggestion made by the probation officer as to what he believes to be a correct enhancement.

He also does not agree with the criminal history category computations. He says they are excessive, and he also says that they overrepresent the criminal history of the defendant, and he has comments and objections as to the structure of the sentence as to his particular client.

Mr. Jones you want to speak to your client's positions first?

MR. JONES: Yes, sir. May it please the court, Mr. Traynor and Mr. Forster and my client Ricardo Curtis Lopez, Mr. Lopez does object to the three aforementioned unresolved Guideline issues that this court has previously pointed out.

With regards to the obstruction of justice, I'll relate back to my main argument back in the objections to the [7] presentence report. Inasmuch as Mr. Lopez did make a couple of rather incriminating statements at the time of his arrest, however, he did plead not guilty at the time of arraignment, advised me of the actions or the potential exculpating events of Mr. Dean and went to trial and testified right there on that stand as to what he did and what he did not do.

In regards to any aspects associated with the obstruction of justice and the commentary notes that were addressed in the application notes from The United States Sentencing Guidelines section 3C1.1, Mr. Lopez exercised his constitutional rights to plead not guilty, to testify under oath that he was not the one involved, was not the person that did what he did.

Whether or not he made statements at one point to in particular Law Enforcement Officer Chuck Reid of the FBI, it certainly did not preclude Special Agent Reid from furthering and following up on the investi-

gation as to what might have been Mr. Dean's involvement in this aspect.

Simply put he did not willfully obstruct or impede. He did make statements at the beginning of the investigation. He did exercise his constitutional right of pleading not guilty and going to trial, and he did get up on the stand, and he was convicted, and obviously the 12 jurors that sat in judgment did not believe his story, and that's the ultimate basis for his being found guilty.

[8] But I would ask and would supplement that he did not provide any materially false information to the jury. He didn't lie. He stated what he stated. Now they just did not believe him, and I would hope and expect there is a fantastic difference between that is what is not believed and what is believed. So it goes to, I would say, an issue of credibility instead of an issue of lying or providing material false information to your honor and to the court including the jurors that sat in judgment.

The second aspect that I would argue is that the proper sentence under the firearm provision of section 924(c) is the 7-year minimum for he did brandish a firearm. I would point to the case of the United States District of Columbia which is the United States of America versus Kevin Patrick Luke Brown. I believe you've got a copy after that case, and certainly won't go back into the facts, but that case is the ultimate case on point.

Though it's not in the Eleventh Circuit, it is a situation where it was an accidental discharge, and the D.C. District Court found that the proper determination was a 7-year minimum sentence.

I have reviewed what Mr. Traynor has produced in his objections, mainly the Brantley case and the unpublished case of—I forget what case that is. I'm not sure how an unpublished case comes into play in this regards, but I [9] understand that the Eleventh Circuit under Brantley looks at this as being a strict construction. You don't need to have general knowledge.

I would point out that in the Brantley case that was an issue of I didn't know that the gun I was handling at the time had been manipulated to make it a fully automatic assault rifle. In this situation it's more of an aspect of the accidental discharge of a firearm during the commission of this bank robbery.

Again, even the testimony from, I believe it was Nora Hall and her statement in the presentence report, in the final presentence report that she did not believe that it had gone off was, I believe, the most telling testimony of the whole situation.

Certainly the Eleventh Circuit has the Brantley decision, and I don't know if the Claret case, which is nonpublished, I don't—again I'm not certain as to how a nonpublished case creates stare decisis, but I would hope that it does not, and if it does not, the proper case on point is the District Court of the District of Columbia, and I would ask that the 7-year minimum or the 7-year enhancement would be proper versus the 10-year enhancement.

Finally, sir, the argument that is associated with his criminal history, the events that occurred back in, I want to say, July of 1997 in Newton County where there was four or [10] five day spree by my client, maybe it was a three to four day spree where he used the same weapon, which I think was a BB gun, he

went to I think an Indian-owned convenience store and on successive days robbed through an act of violence these three I want to say, no more than four convenience stores.

The probation officer Jeffers kindly points out the. United States versus Smith, which is 385 F.3d, 1342, as the case that states that without a formal consolidation order that the events should be considered separately.

Again, there are facts in this Smith case that are completely different from this case. The Smith case deals with over a three-day period of time where there was more randomness in defendant Smith's actions during his course of criminal conduct and enterprise.

Fortunately for Mr. Lopez the events that occurred were basically of the same occasion, of the same event, of the same transaction, of the same victims and of the same victims's locations.

I would also add that through the court, the juvenile court he was sentenced to an—I think the presentence report shows a four-year commitment. My client is adamant that it was a five-year commitment, and to further show that this is one similar transaction, he was sentenced to one offense under one sentencing and based upon O.C.G.A. section 15-11-63, which is the designated felony acts and restricted custodies, that the [11] longest period of time that a juvenile as in Mr. Lopez' case at that time could be sentenced for no more than 60 months.

So the three or four events that occurred back in July of 1997 was not taken up by the superior court in Newton County, was a juvenile court matter, whether it was out of administrative convenience

that they sentenced Mr. Lopez, they did sentence him to one sentence combining all four of the three or four I think it's four criminal actions, but I would also add, as hopefully a little extra bite to the argument, that the statute, again that is O.C.G.A. section 15-11-63, only allows for a five-year commitment in the department of juvenile justice system.

I would ask that you incorporate those arguments and determine that Mr. Lopez' proper criminal or his proper excuse me, sir, his proper offense level should be a 22, and his criminal history should be a category 2 with count 2 running consecutive being a 7-year consecutive sentence instead of a 10-year consecutive sentence.

I'd also add—I'm probably jumping ahead. I'll wait for the issue of restitution to be addressed, but I would ask that those three issues be ruled upon in Mr. Lopez' favor.

Thank you, sir.

THE COURT: Thank you, Mr. Jones. Mr. Traynor, do you want to reply now or you want to wait until we hear from Mr. Forster?

[12] MR. TRAYNOR: Your honor, given the similarity between many of their objections, I'd be glad to wait for Mr. Forster.

THE COURT: That might better for both cases that we handle it that way.

You want to speak to his situation then, Mr. Forster?

MR. FORSTER: If it please, your honor, I've filed several objections. I suppose just the order I wrote them. They have an increase for two levels in obstruction of justice in paragraph 32 of the PSR, we

object to that. He confessed. He's going to get—he's bringing a lot more justice on himself at this point based on his conduct. To say he has obstructed justice, he has offered to plead guilty from day one. He has confessed.

It's incomprehensible to say that with regards to his own conduct, he has obstructed justice. I think he's subjecting himself to far more justice because of his own conduct. I don't think it's obstruction.

This PSR does not give him any acceptance of responsibility. The application notes under acceptance talk about going to trial does not per se mean you don't get acceptance.

The application note 2, a determination that a defendant has accepted responsibility will be based primarily [13] upon pretrial statements and conduct.

In this case he wrote the court letters wanting to plead guilty. He wrote the U.S. Attorney's Office wanting to plead guilty. He told me enough times he wanted to plead guilty, and then he gets on the witness stand and confesses to a jury of his conduct. I don't know how you can accept responsibility any more than he did.

To the extent he did not acknowledge the government's version of the facts in this case but he accepted a whole lot more responsibility in this case than I wish he had, and I just don't how [sic] he could accept anymore, judge, so we would ask for two levels for acceptance.

I do put in there that even assuming some obstruction, which I don't assume, but even if I admitted that, he can still get obstruction and acceptance, and that's application note 4, conduct resulting in the ob-

struction enhancement ordinarily indicates that a defendant has not accepted responsibility for his criminal conduct, there may, however, be extraordinary cases in which adjustments of both acceptance and obstruction apply.

THE COURT: I've seen a case like that. I agree with that.

MR. FORSTER: I think at the very worst that's what this is. I don't think your honor should give him any obstruction, and I do think you should give him a couple of [14] points for acceptance.

THE COURT: Mr. Traynor may be willing to make a recommendation as to the third point. We'll see what he has to say.

MR. FORSTER: I wouldn't object if that's what he wanted.

THE COURT: Go ahead. I didn't want to interrupt your flow.

MR. FORSTER: Let's see, I object to the seven years versus the ten years. We cite that D.C. Circuit case U.S.A. versus Brown. I don't think there's any real dispute that the gun in this case went off accidentally.

They couldn't find the bullet. I remember in some of the evidence that when they were asking Mr. Lopez in his interview about the gun, he got all nervous, and they talked about that. He wasn't sure whether he almost shot himself. So I think there's no real dispute that the gun went off accidentally.

I have been provided this unpublished Eleventh Circuit opinion. We provided the D.C. Circuit from June of 06, and we would ask the court to accept the

legal conclusions of the D.C. Circuit, seven years consecutive rather than ten.

Let's see, I make some objections regarding criminal history. The first one is that it wasn't proved to a jury. I am doing that to preserve an issue. I understand what the law [15] is, that whole line of exceptions on Almendarez-Torres. I'm aware of all that. I'm just preserving an issue on the chance that that law changes. I don't expect that it will, but I want to at least preserve my issue.

I object to paragraph 44 for two criminal history points—wait a minute, let's see, no, your honor, I wrote the wrong number down. I wrote 44 but they didn't give him two points for 44, your honor.

THE PROBATION OFFICER: Your Honor, if I may, he did in fact object to 44. Two points were assessed in the initial report. Those were later redacted.

MR. FORSTER: Okay. I win then. I'll move on. I argue that the—well, let's see. Your honor, I also suggest to the court that the entirety of the criminal history overstates. Some of this, a goodly amount of this criminal history was juvenile. Some amount of this criminal history occurred after the incident that they got arrested for. It was a jail issue that they had. It's cited in here.

My client got a split sentence. That's what he got it from was something that in the presentence report leads to three criminal history points.

I would think just the entirety of the criminal history points and the way I read that, some of it being juvenile, some of it being after the incident that took place here, we would just ask the court to go from six to four on [16] criminal history. I think your honor

would have authority to do that, and I think that's what we would say is the proper criminal history level to end up at.

Okay. Let's see, request for concurrent sentence, which is my number 4, I admit that count 2 has to run consecutive. He is serving state time now, a 25 to do 12, that's the split sentence that I talked about.

I understand that the 924(c) count has to run consecutive to the state court. The Supreme Court is clear on that and consecutive to Count 1, federal charge. The Count 1, the bank robbery, does not have to run consecutive to the state charge.

So I'm asking—the presentence report says he came into federal custody on, I think it said November 10th of 04 is the arrest date and in federal custody the entire time.

We would ask for the court's sentence on Count 1 to run concurrently with the state sentence. Count 2 the court doesn't have any authority, I accept that, but 5G1.3, the court has the authority to run the sentence concurrent. We are asking you to do that.

And the last argument I make, I wasn't sure how to couch it other than to say mitigating role. I understand what the verdict was. Your honor sat through the evidence for three days, just like everybody else did. I think that if this case were tried today, there might be a different result.

[17] I couldn't ever look at a jury with a straight face and say somebody confessed to a crime they didn't do. I'd say that to my parents, but they'd look at me like I'm crazy, and then this Jon Benet Ramsey thing happens, and people do confess to crimes they didn't do. It doesn't happen often but it does happen.

This never was a conspiracy case, judge. As I say this is the point where under the sentencing statute the court has to give a sentence sufficient but not greater than necessary to meet all the requirements, and your honor heard the evidence.

They are not—my only personal opinion is I don't think Chris ever did this thing but he confessed and I understand all that, but even the government's recitation of what he thinks the facts would be would mean that my client is less culpable.

Arguably he drove the car. Again I don't think there was any evidence on that, but that's how the government argued that this was a conspiracy. Which means it's very possible that even if he knew of a gun, he didn't know it would be discharged.

I didn't know another way to couch this other than lesser role, and the court has authority. So we're asking for—I mean your honor heard the evidence. Sentence them according to what the evidence calls for.

[18] We would ask for acceptance. We would ask for no obstruction. We would ask for a concurrent sentence. We would ask for criminal history 4 and seven years rather than ten. I think that's covers it. Thank you, your honor.

THE COURT: Thank you, Mr. Forster. You, gentlemen, have very thoroughly reviewed these cases and submitted objections that I commend you for your thoroughness, both of you, in handling this.

Mr. Traynor.

MR. TRAYNOR: Good afternoon, your honor. Your honor, I would reply primarily on our written response to the defendant's objections.

Our position is that the north star in this case in this sentencing hearing is the defendants were charged with and convicted of conspiracy and aiding and abetting. Those are the charges that the grand jury indicted them on. Those are the charges they have been convicted of.

Now as far as acceptance of responsibility, neither of them have ever accepted responsibility for the conspiracy and the aiding and abetting. They have never—they both got on the stand and continued to deny that, and so we can't see how they should get any credit for accepting responsibility when they have denied and continue to deny the charges they were convicted of.

Now on the obstruction of justice, Mr. Lopez first [19] took sole responsibility for the robbery. Then he recanted at trial and told us all about this chopshop operator and this drug dealer who he never would name.

People are certainly entitled to plead not guilty, go to trial and testify and testify and have the jury not believe them, and I certainly understand that not every defendant who is in that situation should get the enhancement for obstruction of justice.

But in this case both Mr. Lopez and Mr. Dean have really gone far beyond that, far beyond just getting up and disagreeing with other fact witnesses in the case. They've just tried to manipulate the investigators into trying to get the outcome of apparently what they wanted is Mr. Lopez to be completely exculpated and then Mr. Dean would take the entire hit for them.

So in this case we think they have gone far beyond just giving false testimony at trial and that they both

should receive the enhancement for obstruction of justice.

On the 924(c) issue, the important part of the unpublished case, the Claret case, is that they apply the Eleventh Circuit published decision in Brantley, and Brantley is the case Mr. Jones discussed a minute ago about the possession of the machine gun, and in the Brantley case, the Eleventh Circuit distinguishes between substantive offenses which require a separate mens rea and sentence enhancements, [20] and it found that these different divisions in 924(c) were sentence enhancements that did not require a separate mens rea, and then that's what they apply in Claret to reject the defendant's argument that they should not receive the ten years because the firearm discharge was accidental.

So we think that the Claret decision in itself being an unpublished opinion is a good indicator of what the Eleventh Circuit would do in this appeal with this issue, and then the Claret opinion also shows us how the Eleventh Circuit would apply the published precedent of Brantley in accord with the Tenth Circuit opinion that rejects the defendant's argument. So we think the probation officer is right in recommending the 10-year sentence under 924(c).

Mr. Lopez' objections about the criminal history, again we believe the probation officer has got it right under the Smith case. There were several robberies in a short period of time where they were different occasions, different robberies, different victims, it's not a common scheme, they weren't consolidated, there's nothing that appears they were functionally consolidated, so we think under chapter 4 of the Guidelines they are separate offenses.

Mr. Dean's objections, he contests the criminal history score because the sentence for some of the things—the jail riot happened after he was arrested in this case. Chapter 4 of the Sentencing Guidelines, and especially [21] application note 1.2, focus of prior sentences not prior convictions. These are all prior sentences before this case, and so we believe that the PSR in correct in assessing Mr. Dean's criminal history.

And then finally the request for a concurrent sentence, I think the court knows I've had cases where I've recommended concurrent sentences. I was thinking about Mr. Crawford, the man who was digging holes out in the battlefield, and then Mr. Glover, the man who was he was fishing and he had a pistol. He was a convicted felon. He had a pistol allegedly to shoot snakes and he also had a backpack with a little vial full of methamphetamine.

Those were cases where they already had big state sentences like Mr. Dean and the federal sentence wasn't going to add much, and under the sentencing factors of 3553, it seemed to be just that they should be concurrent sentences and I recommended that.

In this case we have a 19-year-old man who I think the remarkable thing about this case is at 19 he's already worked his way to criminal history 6, and so under the sentencing factors of 3553 the court needs to his criminal history makes it especially important for the court to consider his future dangerousness and the need to protect the public from someone who has such violent tendencies.

In addition, part of his sentence in the conviction [22] he got for the jail riot was for violating his probation, which especially at that stage of the game shows

a tremendous disregard for court orders in his sentences, and so under the sentencing factors of 3553 we cannot recommend a concurrent sentence for Mr. Dean on the bank robbery count.

Thank you.

THE COURT: Do any of you want to put in evidence the records the probation officer has concerning Mr. Lopez' various trials or tribulations in the juvenile court system.

MR. JONES: I have not seen it sir.

That's fine.

THE COURT: The court had asked for these documents and reviewed them, and I'll put them in the record. They need to be in the record for the benefit of the parties.

The testimony that was transcribed by one of the law enforcement officers that I referred to earlier was agent Reid, the court indicated it had reviewed it.

Each of the defendants in this case has objected to their respective presentence report on the grounds that the probation officer added a two-point enhancement for obstruction of justice.

The court overrules the objection of each defendant as to that enhancement and accepts the position of the probation officer and the position of the government.

I will point out for the purpose of the record and [23] for the benefit of the parties and counsel that this is a case in which each defendant clearly, purposely, intentionally obstructed justice.

Mr. Lopez gave great details about this robbery shortly after it occurred. Then he took the witness stand and testified exactly opposite.

Mr. Dean, after he got a sentence of considerable length in the state court system here in Floyd County, apparently decided that he would take the fall for his brother-in-law since he already had time to serve, and I suspect he felt sure that any sentence in this court would be concurrent with any sentence he has in the state court system or likely the other authorities other than the courts would see that they ran concurrent, so he would protect his brother-in-law against having any time to serve. So he took the witness stand, testified about how he committed this offense.

Both the—I would use a word with reference to each of these defendants that I seldom use as to any witness that testifies, and I've heard testimony in court for many years, testimony many times of a lawyer, and I don't easily call people liars, but each of the defendants in this case purposely lied with an intent to obstruct justice. So the enhancement is appropriate for both of them.

Neither of them is entitled to credit for acceptance [24] of responsibility. As pointed out by Mr. Traynor, neither of them have ever accepted responsibility for what they really did and how they did it and the specifics of what they did.

They are not being punished by the court for going to trial. That's their right under the constitution. I see that right exercised regularly, and I exercised it many times on behalf of my clients when I was practicing law as do many lawyers simply for the reason that it is ripe under the constitution, and if a citizen

desires it, he or she is entitled to it, but here there was no acceptance of responsibility, and there's not yet been as of today even. So the court does not grant either of these defendants credit for acceptance of responsibility.

The court has reviewed the cases you, gentlemen, submitted on what it believes are applicable authorities concerning the enhancement provisions, and the court concludes that the reasoning and logic of the Eleventh Circuit in the unpublished opinion submitted by Mr. Traynor known as the Claret decision is logical and is a correct interpretation of the statute at issue.

It has to do with a sentencing provision and a sentencing enhancement and does not require a specific intent to discharge a firearm before the ten-point enhancement is appropriate, and the court believes previous Eleventh Circuit authority supports the court's view that the Claret decision is [25] correct, and the court will enhance the sentences as to each of these defendants ten points for the firing—for the discharge of a firearm during this armed robbery.

The court in Mr. Lopez' case concludes that these cases are not related, that is the cases for which the defendant was sentenced in juvenile court some years ago. They all were separate armed robberies. They were not a series of drug transactions or embezzlement transactions or shoplifting type infractions of the law that occur. These were each crimes of violence and independent armed robberies done by this person as a juvenile.

The cases were all sent over to one court and one judge handled them, but they all maintain their identity, each case did, for the purposes of the record, and

each case was independently adjudicated. So the court concludes that they are not related.

The court further finds that if they are related and the court is wrong in its conclusion that they are related, then the proper guideline for consideration is section 4A1.1F, and I would point out that these crimes are crimes of violence, and they did not occur on the same occasion.

If they are not considered related to each other pursuant to either subsection a, b or c of guideline section 4A1.1, then the proper computation for the offense in paragraph 53, I believe, would be two points. The next two paragraphs [26] would [sic] one point each which would change the total computation by two points and would change the defendant's criminal history category from a four to a three.

I have not determined and do not determine at this point that that is the appropriate guideline section in this case since the court has found based on the documents before it that these cases are not related cases. So the court overrules the objection by Mr. Jones to those conclusions of the probation officer.

The court has spoken to Mr. Forster's objections on behalf of Mr. Dean to the actions of the probation officer in denying a mitigating role in the presentence report to Mr. Dean a finding that he obstructed justice, the denial of the granting of acceptance of responsibility. I have spoken to the issue of the minimum sentence required.

The criminal history computations I believe are at no issue at this point, so I'll deny the objection because they are correctly computed, even though some of the sentences occurred after the date of this occurrence for which the defendant is before the court to-

day. The court finds that the criminal history category was properly calculated.

Now, there's a claim of overrepresentation of the criminal history. The court notes that in the development of criminal history categories under the United States Sentencing Guidelines very careful consideration appears to have been [27] given when you look at the structure as to how a criminal history category is ultimately determined.

When you look at the structure of the Sentencing Guidelines and you see that under certain circumstances where a person is particularly violent, clearly an individual with no regard for the law, there is a method by which it is determined whether or not he or she is a career offender.

You become a career offender when you commit a couple of certain type violent crimes and drug crimes. There is a—I believe that people who serve time in the penal institution ought to not violate the law for a little while after they get out or after they complete a sentence.

So if within two years after you are released from confinement you get in trouble again with the law, you get an enhancement. There is nothing illogical about that. If you're on probation and you get in trouble with the law again, you get an enhancement. No person could argue with any justification that that's not appropriate.

If you are in prison and you commit a crime while you are in prison and you get a sentence for a crime you commit while you're in prison, no person could justifiably argue that that should excuse you from getting an increase in your criminal history category just because you did it while you were in prison.

So all those type of things each had most of the [28] things I mentioned each had a little bit to do with the development of this high criminal history category this defendant Mr. Dean has, plus some just plain old crimes he committed. So the court finds that his criminal history category is not overrepresented.

The last objection Mr. Forster made or position he took was the structure of the sentence, as to how the court shall structure the sentence, and I take that as argument and positions taken that the court ought to consider and will consider when it hears from the defendant and his lawyer at the articulation point in the sentencing hearing.

So the court denies all the objections made on behalf of the defendant Mr. Dean to the presentence report in his case and adopts all of the findings of fact and conclusions contained in the presentence report in Mr. Dean's case and makes all of those findings of fact and conclusions those of the court in all respect except as modified orally in the court's findings and conclusions here this afternoon.

The same is true in Mr. Lopez' case. The court denies all of the objections made by defense counsel on behalf of Mr. Lopez and adopts all of the findings of fact and conclusions contained in the presentence report as prepared by the United States Probation Officer and makes all of these findings of fact and conclusions those of the court in all respects except as orally modified by the court's findings and [29] conclusions at this hearing this afternoon.

So the court's sentencing options are as follows, except for the issue of restitution which I'll need to hear from counsel about:

On Count 1, the sentencing range by the statute is not more than 20 years and a 250,000 dollar fine. On Count 2 would be five years up to life imprisonment and a 250,000 dollar fine depending on facts found by the court, and the court has found facts that will mean a minimum mandatory ten years up to life imprisonment and a 250,000 dollar fine. These conclusions are the same in the presentence report with reference to each of these defendants.

At this point they begin to differ. Mr. Dean's criminal total offense level is 24. His criminal history category is 6. His custody guideline range on Count 1 is 100 to 125 months and 10 years consecutive on Count 2. The fine guideline range is 10,000 dollars to a hundred thousand dollars. The restitution we will talk about in a moment. Special assessment of 200 dollars is required as a part of the sentence. Cost of confinement is estimated at $23,431.92 a year. Supervision is estimated at 3450 dollars a year. Probation is not authorized. Supervised release of two to three years is required as to each sentence in this case.

In Mr. Lopez' case, the statutory penalty is not more than 20 years and a 250,000 dollar fine. Count 2 from five [30] years to life imprisonment and a 250,000 dollar fine. Based upon the conclusions that the court has made in response to objections to the presentence report, the minimum mandatory would be 10 years to life. The total offense level here for him is 24. His criminal history category is 4. Custody guideline range on Count 1 is 77 to 96 months and 10 years consecutive on Count 2. Fine guideline range is 10,000 dollars to a hundred thousand dollars. Restitution we will have to see about. A special assessment of 200 dollars is required as a part of the sen-

tence in this case. Cost of confinement is estimated at $23,431.92. 3450 dollars is estimated as cost of supervision. Probation is not an option. Supervised release of from two to three years is required on each count.

What's the government's position on restitution? The court has received nothing on restitution except the bank's claim, I believe, for 2605 dollars.

MR. TRAYNOR: That would be it, your honor. About 3600 dollars was taken in the robbery. They got a thousand thirty-seven out of Mr. Lopez' pants pocket which leaves the 2600 dollars. The bank had to do a few repairs but nothing substantial. So our position would be that they would be joint and severally liable for the 2600 dollars.

THE COURT: Do you, gentlemen, take any issue with that?

MR. FORSTER: Your honor, that is what the evidence [31] showed. They did recover some portion of it. That restitution amount is strictly the monetary loss. That's what the evidence showed.

THE COURT: All right.

MR. JONES: I concur with Mr. Forster, 2600 dollars would be the fair—

THE COURT: Well, there was some issue or concern about Jacks Auto Sale. The court has not been provided any documentation. There's been no response to the probation office request for documentation. So the court concludes as to the issue of restitution for Jacks Auto Sales, there is nothing before the court that it can utilize to make a determination on that issue and will not further concern itself with that part of the case.

You want to come around with Mr. Lopez and let me hear from you, Mr. Jones, and from him as to what court ought to do?

MR. JONES: Your honor, speaking on behalf of Mr. Lopez, we'd like to first, he's been in custody since November 10th, 2004. We'd first ask that whatever sentence you do impose that you give him credit for the time that he has been incarcerated. He was denied bond or bail or anything of that nature. So he has been in custody since November 10th of 2004.

Second issue that I would ask that the court to rule [32] upon or to order is that he be entitled to the drug treatment programs that are afforded to him by the Bureau of Prisons for the mere fact that I believe his—not only his presentence report and his final presentence scream out that he needs controlled substance help.

He seems to be incredibly dependent upon mainly marijuana which may have been the underlying reason for the problems that they're in today. I would ask that that be given giving him the opportunity to seek that treatment while in the facility and to hopefully complete it and most importantly just be entitled to receive that needed treatment.

Also I would ask that at this present stage based upon the findings of this honorable court that you would sentence him to the low end of the guideline range. He will be looking at I think on the low end, if my math serves me correctly, I think 197 months which would be a more than fair sentence under the facts, under the circumstances, under the situations that this case presents itself.

I'll let Mr. Lopez follow up any concluding remarks That I

THE COURT: Yes, I'd like to hear what you have to say, Mr. Lopez, before sentence is imposed.

DEFENDANT LOPEZ: Your honor, I can't make an excuse for what happened. I mean we could I could say it was drugs, I could say it was the debt, I could say it was plenty [33] of things. There's no excuse for it, and I'm just glad that nobody was physically hurt in what took place.

I just ask the court—I can't even ask the court to be lenient. With my record and what happened, I can't ask the court to be lenient. All I'd just like to say is I'm just glad nobody was hurt. That's it.

THE COURT: Thank you very much. Mr. Traynor.

MR. TRAYNOR: Your honor, given the minimum mandatory sentence in this case, we're going to agree to a low end sentence on Count 1.

THE COURT: Pursuant to the Sentencing Reform Act of 1984, it's the judgment of the court that the Defendant Ricardo Curtis Lopez be and is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 78 months on Count 1 and a term of 120 months on Count 2 with Count 2 to be served consecutive to the term imposed on Count 1 for a total sentence of 198 months.

It is further ordered that the defendant shall pay to the United States a mandatory special assessment of 200 dollars which shall be due immediately.

It is further ordered that the defendant shall make restitution jointly and severally with the codefendant in this case to the following persons in the following amount to AmSouth Bank in the amount of 2605 dollars.

The court has not ordered restitution as to Jack's [34] Auto Sales for the reasons previously set forth in the record.

The defendant shall notify the United States Attorney for this district within 30 days of any change of mailing or residence address that occurs while any portion of the restitution remains unpaid.

The court finds the defendant does not have the ability to pay a fine and the cost of incarceration. The court will waive a fine and the cost of incarceration in this case.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of three years. This term consists of three years on Count 1 and a term of three years on Count 2. Both of these terms to run concurrently.

Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall report in person to The United States Probation Office in the district to which the defendant is released.

While on supervised release, the defendant shall not commit another federal, state or local crime; shall comply with the standard conditions that have been adopted by this court and shall comply with the following additional conditions:

The defendant shall submit to one drug urinalysis within 15 days after being placed on supervision, and at least two periodic tests thereafter.

The defendant shall participate in a drug/alcohol [35] treatment program under the guidance and supervision of the United States Probation Officer, and if able contribute to the cost of services for such treatment.

The defendant shall make a full and complete disclosure of finances and submit to an audit of his financial documents at the request of the United States Probation Officer.

The defendant shall pay any financial penalty that's imposed by this judgment and that remains unpaid at the commencement of the term of supervised release at a rate established by the United States Probation Officer in accordance with the court-approved payment schedule but at no less than 200 dollars a month.

The defendant shall not incur new credit charges or open additional lines of credit without the approval of the United States Probation Officer unless the defendant is in compliance with his payment schedule.

The defendant shall not own, possess or have under his control any firearm, dangerous weapon or other destructive device.

The defendant shall submit to a search of his person and property, both real and personal, residence, office, motor vehicle at reasonable times in a reasonable manner based upon reasonable suspicion of contraband or evidence of a condition—of a violation of a condition of release, and [36] failure to submit to such search may be grounds for revocation, and the defendant shall inform any other residents of the premises that it may be subject to seizures and searches subject to this condition.

Pursuant to the law requiring mandatory DNA testing for federal offenders convicted of felony offenses, the defendant shall cooperate in the collection of a DNA sample as directed by the probation officer.

On Count 2 I initially thought the supervised release term was up to three years, it's up to five years. So the court vacates its order as to the term of supervised release for Count 2 for three years and imposes a term of five years supervised release with that term to run concurrent with the term of supervised release of three years imposed on Count 1.

The court has imposed the sentence that it has in this case because it's appropriate under the law. It's appropriate under The United States Sentencing Guidelines, and it's appropriate under the facts and circumstances of this case.

The court in reviewing the United States Sentencing Guidelines, hearing the position of defense counsel, hearing the statement of the defendant himself concluded that it was appropriate that the court sentence this defendant at the bottom area, bottom portion of the guideline range which the court has determined was appropriate under the circumstances of [37] this case and under The United States Sentencing Guidelines.

The court in considering The United States Sentencing Guidelines in this case discussed with counsel the provisions and its conclusions as to what would be an appropriate determination of the defendant's criminal history category if the court was incorrect in its view of related offenses and if it should have ruled otherwise, the criminal history category would have been different. It would have been three instead of four.

Had his criminal history category been determined by this court to be three, the court still would have sentenced this defendant at a level 28 on Count 1.

The court made the determination that the appropriate level was level 4 and sentenced the defendant at the bottom of that guideline range, and had I determined it to be a level 3, I would have sentenced him at the top of the guideline range, and not far of your request on behalf of your client, Mr. Jones, or the government's recommendation.

Also, the court in determining what's an appropriate sentence in this case ultimately has imposed a sentence regardless of any miscalculation or improper determination of any guideline level or any guideline determination, the court has imposed a sentence that it thinks is right and fair and proper recognizing that The United States Sentencing Guidelines are advisory but highly advisory, and the court has imposed a [38] sentence in this case that meets the mandatory requirements of the law with reference to the sentencing requirements with reference to Count 2 in this indictment, and the overall sentence in this case is imposed for the purpose of and does consider the nature and circumstances of the offense and the history and characteristics of the defendant in this case.

The sentence imposed is intended to reflect the seriousness of the offense, to promote respect for the law and provide just punishment for the offense.

It is also done to avoid to provide adequate deterrence to criminal conduct and to protect the public from further crimes of this defendant.

Now while the court does not believe your client will be entitled to or able to participate in the Bureau of Prisons 500 Hour Alcohol and Drug Program because of the use of a gun in connection with this offense, I'll still grant your recommendation and re-

quest, and the court recommends that he be allowed to participate in the Federal Bureau Of Prisons Intensive Drug and Alcohol Treatment Program.

Mr. Lopez, you have a right to appeal to a higher court from everything the court has done in the case almost. If you do want to appeal to a higher court, you have to do so within ten days from today or you forever lose your right to appeal to a higher court.

If you do want to appeal to a higher court and you [39] don't have the money to hire a lawyer to handle your case on appeal, the court will appoint counsel to represent you on appeal, and you can appeal to a higher court without any cost whatsoever to yourself.

Do you want to put any exceptions in the record, Mr. Jones?

MR. JONES: Can I reserve those?

THE COURT: No, you have to put them in here.

You can object to every ruling I've made of the guidelines with reference to your client if you want to, but you do have to put them in the record.

MR. JONES: Sir, I would object to your ruling as to, first of all, the obstruction of justice. I would also object to the findings of the minimum sentence of 10 years instead of 7. I would also object to considering the juvenile offenses from Newton County as unrelated for purposes of Mr. Lopez' appeal rights.

THE COURT: All right. Mr. Traynor.

MR. TRAYNOR: No objections, your honor.

THE COURT: Thank you very much for handling this case, Mr. Jones.

MR. JONES: It's been my pleasure, sir.

THE COURT: Mr. Forster, if you'd come around with your client.

Anything you want to say before sentence is imposed [40] in his case?

MR. FORSTER: Your honor, I would continue to object to the rulings with regards to obstruction, but you'll ask me that in a minute, but given that the rulings that the court has made, the guideline would be a hundred to 125 with a 120 then consecutive, we would ask for the minimum guideline sentence given the court's rulings.

We would ask for him—the PSR indicates that he has been in federal custody since November 10th of 04. We would ask for the court to grant him credit for all of that time that he has served.

I asked in my pleadings for a concurrent sentence with regards to Count 1 and his state charge. I think that would be accomplished—I would ask for it specifically, but I believe that would still be accomplished if the court gives him credit for the entirety of his time in federal custody.

He is serving a state sentence now that he has been in the custody of this court, and we would ask for his time to count from November of 04 through today and then Count 1 to run concurrent with that split state sentence, and then, again, I would reassert the objections that I made and that I have argued to this point.

THE COURT: Anything you want to say, Mr. Dean?

DEFENDANT DEAN: Yes, sir, first off I would like to apologize to the court for my actions and causing problems. I [41] would like to ask you to take into

considerations my request of my time that I've already done and everything, sir.

THE COURT: Mr. Traynor.

MR. TRAYNOR: Your honor, I'm looking for the statute. I believe the Bureau of Prisons our position would be that Mr. Dean came into state custody in November 04, and he has been writted here, and so every day he's here he's getting credit against his state sentence.

So the Bureau of Prisons will say and I can find the statute in a minute that they cannot give him credit back to November 04 in this sentence because he's already getting it in his state sentence. So I can't concur with counsel's recommendation on that.

Again, in light of the high minimum mandatory, we agree that a low end sentence is appropriate in this case, but for the reasons I stated before, I cannot agree that the Count 1 sentence should be concurrent. We think the whole federal sentence should be consecutive to the sentence he's now serving.

THE PROBATION OFFICER: Your Honor, the defendant was arrested on November 10th, 2004. He was arrested on state charges relating to the instant offense. It's my understanding that he came to federal custody pursuant to a writ. The underlying state charges were dismissed or dead docketed December 13th 2005.

[43] Whenever the BOP gets the information and has the Marshals' information, they will apply the correct date depending on how your honor rules on whether it's concurrent versus consecutive.

Whenever he was in state custody appearing for the state charges, they will probably rule that a state day rather than a federal day.

THE COURT: All right. Anything more?

MR. FORSTER: No, sir.

THE COURT: Pursuant to the Sentencing Reform Act of 1984, it's the judgment of the court that the defendant Christopher Michael Dean be and is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 100 months on Count 1 and a term of 120 months on Count 2 with the sentence on Count 2 to run consecutive to the term imposed on Count 1 in this court to the extent necessary to produce a total term of 220 months.

This sentence shall also run consecutive, that is, his total sentence shall also run consecutive to the sentence imposed in Floyd Superior Court in case number 05-CR-28516-JFL-002.

It is further ordered the defendant shall pay to the United States a mandatory special assessment of 200 dollars which shall be due immediately.

It is further ordered that the defendant shall make [43] restitution jointly and severally with his codefendant in this case to the following entity in the following amount AmSouth Bank, 2605 dollars.

For the reasons stated heretofore in this sentencing hearing, the court in this case has not imposed a restitution requirement to Jack's Auto Sales.

The defendant shall notify the United States Attorney for this district within 30 days of any change of mailing or residence address that occurs while any portion of the restitution remains underpaid.

The court finds the defendant does not have the ability to pay a fine and the cost of incarceration and the court will waive a fine and the cost of incarceration in this case.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of five years on Count 2 and a term of three years on Count 1 with those terms to run concurrently.

Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall report in person to The United States Probation Office in the district to which the defendant is released.

While on supervised release, the defendant shall not commit another federal, state or local crime; shall comply with the standard conditions that have been adopted by this court [44] and shall comply with the following additional conditions:

The defendant shall submit to one drug urinalysis within 15 days after being placed on supervision and at least two periodic tests thereafter.

The defendant shall participate in a drug/alcohol treatment program under the guidance and supervision of The United States Probation Officer, and if able contribute to the cost of services for such treatment.

The defendant shall make a full and complete disclosure of finances, submit to an audit of financial documents at the request of The United States Probation Officer.

The defendant shall pay any financial penalty that's imposed by this judgment and that remains unpaid at the commencement of the term of supervised release at a rate established by The United States Probation Officer in accordance with the approved payment schedule but in an amount not less than 200 dollars monthly.

The defendant shall not incur new credit charges or open additional lines of credit without the approval of The United States Probation Officer, and the defendant is in compliance with the payment schedule.

The defendant shall not own, possess, have under his control any firearm, dangerous weapon or other destructive device.

[45] The defendant shall submit to a search of his person, property, both real and personal, residence, office, vehicle at a reasonable time in a reasonable manner based upon reasonable suspicion of contraband or evidence of a violation of a condition of release.

Failure to submit to such a search may be grounds for revocation, and the defendant shall inform any other residents of the premises that it is subject to this condition.

Pursuant to the laws which provide for mandatory DNA testing for federal offenders convicted of certain felony offenses, the defendant is required and ordered to cooperate in the collection of a DNA sample as directed by The United States Probation Officer.

The court has imposed the sentence that it has in this case for several reasons. First, it complies with the law. It complies with the provisions of The United States Sentencing Guidelines which the court recognizes are advisory but highly advisory.

It complies with the sentencing requirements as to Count 2. It complies with the provisions of The United States Sentencing Guidelines also as stated and found to be appropriate with reference to Count 1 of this indictment.

The court ultimately has endeavored to impose a sentence in this case that does comply with the spirit

and wording of The United States Sentencing Guidelines, but [46] ultimately in determining what sentence it shall impose in this case, the court has considered and utilizes the mandate of the Congress of the United States which says:

In determining what is an appropriate sentence the court shall consider the nature and circumstances of the offense and the history and characteristics of the defendant.

Two, the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law and the [sic] provide just punishment for the offense, to afford adequate deterrence to criminal conduct, to protect the public from other crimes of the defendant and to provide the defendant with needed both [sic] educational or vocational training, medical care or other correctional treatment in the most effective manner and in this particular case also the kinds of sentences available.

The court states for the purposes of the record that without utilizing The United States Sentencing Guidelines in this case but in determining what is an appropriate sentence in this case based upon the evidence in the case, based upon the statutes the defendant has been found by a jury to have violated, based upon the sentencing factors set out in title 18 of the United States Code, section 3553(a) that I stated in the record, based upon the court's experience, been a practicing lawyer, superior court judge and united states district judge, all for some years, the court has imposed the sentence that it [47] has in this case as being the sentence required in order to do justice between the people and the defendant.

Now, Mr. Dean, to the extent you've not waived well, you haven't waived anything in this case. You

have an absolute right to appeal to a higher court the many things this court has done in this case.

If you do want to appeal to a higher court, you have to do so within ten days from today or you forever lose your right to appeal to a higher court.

If you do want to appeal to a higher court, though, and you don't have the money to hire a lawyer to handle your case on appeal, the court will appoint counsel to represent you on appeal, and you can appeal to a higher court without any cost whatsoever to yourself, but if you do want to appeal to a higher court, remember you must file that appeal within ten days from today or you forever will lose your right to appeal to a higher court.

Do you want to put any exceptions in the record, Mr. Forster?

MR. FORSTER: Your honor, I would object to the court's sustaining of the PSR's two points for obstruction. I objected to that.

I would object to the court's failure to give a reduction of two points for acceptance, and I outlined all that.

[48] I would continue to object to the ten years consecutive versus the seven years on the 924(c) count, the accidental discharge, and I set forth my arguments on that.

I would object to the court's sentencing Mr. Dean in a criminal history 6 for the reasons that I have all set forth. So I will continue to lodge those same objections.

THE COURT: All right. Well thank you.

Mr. Traynor.

MR. TRAYNOR: I have no objections, your honor.

THE COURT: Well, Mr. Forster, thank you very much for representing this gentleman.

MR. FORSTER: My pleasure, Judge.

THE COURT: All right. If there is nothing further, we'll be in recess.

MR. TRAYNOR: Nothing further, your honor.

(Proceedings concluded.)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

[Filed Sep. 05, 2006]

Case No. 4:04-CR-72-02-HLM

UNITED STATES OF AMERICA

v.

CHRISTOPHER MICHAEL DEAN

Defendant's Attorney:
SCOTT J. FORSTER, ESQ.

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

The defendant was found guilty by a jury on Count(s) One and Two (2) of the Indictment.

Accordingly, the defendant is adjudged guilty of such count(s) which involves the following offense:

Title & Section	*Nature of Offense*	*Count No.*
18 U.S.C. 1951(a)	Armed Bank Robbery	1
18 U.S.C. 924(c)(1)(A)(iii) and 2	Discharge of a Firearm During an Armed Robbery	2

The defendant is sentenced as provided in pages 2 through of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay the special assessment of $200.00 which shall be due immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within thirty days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid.

The Court finds that the defendant does not have the ability to pay a fine and a cost of incarceration. The Court will waive the fine and the cost of incarceration in this case.

Defendant's Soc. Sec. No.	8829
Defendant's Date of Birth:	1986
Defendant's Mailing Address:	Kingston, Georgia 30145

Date of Imposition of Sentence: August 31, 2006

Signed this the 5th day of September, 2006

/s/ HAROLD L. MURPHY
HAROLD L. MURPHY
UNITED STATES DISTRICT JUDGE

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of *One Hundred (100) months* on Count One (1), and a term of *One Hundred Twenty (120) months* on Count Two, to be served consecutive to the term imposed on Count One (1) to produce a total term of *Two Hundred Twenty and 00/100 (220) months*. This sentence shall run consecutive to the sentence imposed in docket number 05-CR-28516-JFL002 in Floyd County Superior Court.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

Defendant delivered on to at , with a certified copy of this judgment.

UNITED STATES MARSHAL

By:
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of *Five (5) years.* This term consists of terms of three (3) years on Count One (1) and a term of Five (5) years on Count Two (2), with both such terms to run concurrently.

While on supervised release, the defendant shall not commit another federal, state or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard and special conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

1. The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

2. The defendant shall make restitution to the victim listed in the presentance report, jointly and severally with the co-defendants in this case to the following entity in the following amount:

   ASB $2,605.00.

3. The defendant shall notify the United States Attorney for this district within thirty (30) days of any change of mailing or residence address that occurs while any portion of the restitution remains unpaid.

4. The defendant shall submit to one (1) drug urinalysis within fifteen (15) days after being placed

on supervision and at least two (2) periodic tests thereafter

5. The defendant shall participate in a drug/alcohol treatment program under the guidance and supervision of the United States Probation Officer and if able, contribute to the cost of services for such treatment.

6. The defendant shall make a full and a complete disclosure of his finances and submit to an audit of financial documents, at the request of the United States Probation Officer.

7. The defendant shall pay any financial penalty that is imposed by this judgment, and that remains unpaid at the commencement of the term of supervised release at a rate to be established by the United States Probation Officer in accordance with the Court Approved Payment Schedule, but in no event less than Two Hundred and 00/100 Dollars ($200.00) monthly.

8. The defendant shall not incur new credit charges or open additional lines of credit without the approval of the United States Probation Officer and unless the defendant is in compliance with the installment payment schedule.

9. The defendant shall not own, possess or have under his control any firearm, dangerous weapon or other destructive device.

10. The defendant shall submit to a search of his person, property (real, personal, or rental), residence, office and vehicle, at a reasonable time and in reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to sub-

mit to a search may be grounds for revocation; the defendant shall warn any other residents that the premises may be subject to search pursuant to this condition.

11. Pursuant to 42 U.S.C. §14135a(d)(1) and 10 U.S.C. §1565(d), which requires mandatory DNA testing for federal offenders convicted of felony offenses, the defendant shall cooperate in the collection of DNA as directed by the United States Probation Officer.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6. The defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician, and shall submit to periodic urinalysis tests as directed by the probation officer to determine the use of any controlled substance;

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. The defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record

or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

RESTITUTION

The defendant shall make restitution to the victim listed in the presentence report, jointly and severally with the co-defendants in this case to the following entity in the following amount:

ASB	$2,605.00.

The defendant shall notify the United States Attorney for this district within thirty (30) days of any change of mailing or residence address that occurs while any portion of the restitution remains unpaid.

The defendant shall pay any financial penalty that is imposed by this judgment, and that remains unpaid at the commencement of the term of supervised release at a rate to be established by the United States Probation Officer in accordance with the Court Approved Payment Schedule, but in no event less than Two Hundred and 00/100 Dollars ($200.00) monthly.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

Case Number: 4:04-CR-72-HLM

UNITED STATES OF AMERICA

v.

CHRISTOPHER DEAN

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

COMES NOW CHRISTOPHER DEAN, by and through his counsel of record, and hereby files this NOTICE OF APPEAL to the United States Court of Appeals for the Eleventh Circuit from his conviction, sentence, and judgment entered on August 31, 2006.

This 7th day of September, 2006.

Respectfully Submitted,
SCOTT J. FORSTER

/s/
Attorney for Defendant
Georgia Bar Number 270028

P.O. Box 102
Calhoun, Georgia 30703
706-625-1799

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT.

No. 06-14918

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CHRISTOPHER MICHAEL DEAN,
RICARDO CURTIS LOPEZ,
Defendants-Appellants.

Feb. 20, 2008.

Appeals from the United States District Court
for the Northern District of Georgia.

Before HULL and PRYOR, Circuit Judges, and MOORE,* District Judge.

MOORE, District Judge:

There are two main issues involved in this appeal. First, this Court reviews whether there was sufficient evidence to convict codefendants Christopher Michael Dean and Ricardo Curtis Lopez ("Appellants") for conspiracy to interfere with interstate commerce by robbery in violation of the Hobbs Act, 18 U.S.C. § 1951(a). Second, this Court also examines whether 18 U.S.C. § 924(c)(1)(A)(iii), a sentencing enhancement for discharge of a firearm, includes an intent

* Honorable K. Michael Moore, United States District Judge for the Southern District of Florida, sitting by designation.

element. Lopez also raises separate issues involving a claimed erroneous jury instruction and the consolidation of his juvenile offenses.

Appellants claim insufficient evidence was presented as to the victim bank's Federal Deposit Insurance Corporation insured status. However, 18 U.S.C. § 1951(a), unlike 18 U.S.C. § 2113, requires no such proof. Consequently, the government needed to prove only that Dean and Lopez committed a robbery that had an effect on interstate commerce. The government met this burden through the testimony of an AmSouth Bank branch manager; consequently, we deny Dean and Lopez's § 1951(a) insufficient evidence argument.

Further, given that § 924(c) is a sentencing enhancement, not an element of an offense, this Court holds that § 924(c)(1)(A)(iii) does not contain a separate intent requirement. The mere discharge of a firearm during any crime of violence or drug trafficking, even accidental, is subject to the sentencing enhancement requiring a minimum of ten additional years of imprisonment. Therefore, Appellants' discharge of firearm argument is likewise denied.

I. BACKGROUND

Dean and Lopez were brothers-in-law who cohabitated at the Hidden Glen complex, which is located in or around Rome, Georgia. According to the testimony of Jimmy Tanner, the former manager of AmSouth Bank's Rome, Georgia branch, on November 10, 2004, a masked man entered the bank around 10:00 a.m. The individual, later identified as Christopher Michael Dean, through his own confession, carried a pistol and yelled at everyone to get on the ground. Dean approached the teller stations, opened the secu-

rity gate, and gained access to the teller area. Once inside the teller area, Dean removed bills of currency from the drive-through teller drawer with his left hand, while holding the pistol with his right hand. Next, Dean approached the head teller station. The head teller was on her knees below the station. Dean reached over the crouched teller and with his left hand started taking money from the teller drawer. As he was grabbing the money, Dean discharged the gun in his right hand, leaving a bullet hole in the partition between the two teller work stations. Upon discharge, Dean cursed himself as if the shot was inadvertent. Immediately after the shot, Dean grabbed as much money as he could from the head teller drawer and ran out of the bank. Manager Tanner observed Dean exit the bank and enter a silver Ford Taurus without licence plates. In all, Dean stole $3,642.00.

Through further trial testimony, it was established that AmSouth Bank is headquartered outside of Georgia in Birmingham, Alabama. After the robbery, the Rome, Georgia branch remained closed for the remainder of the day. Also during the course of Tanner's trial testimony, the government moved for admission of AmSouth's FDIC certification, which revealed that AmSouth operated in numerous states and was FDIC insured. Defense counsel objected and argued that the certificate was testimonial and not self-authenticating. The document was admitted over objection.

After their arrest, both Lopez and Dean, at different times, claimed responsibility for the robbery. The government maintained that the evidence supported finding that Dean and Lopez conspired to rob AmSouth based upon (1) their cohabitation; (2) joint drug debt; (3) Lopez's knowledge of the robbery's

factual details; (4) and Lopez's possession of the firearm used in the bank robbery. Ultimately, the jury found both Dean and Lopez guilty of conspiring to interfere with interstate commerce by robbery, in violation of the Hobbs Act, 18 U.S.C. § 1951(a) (count one); and aiding and abetting each other in the discharge of a pistol during an armed robbery, in violation of 18 U.S.C. § 924(c)(1)(A)(iii) and 18 U.S.C. § 2 (count two). The district court sentenced Dean to 100 months as to count one and 120 months as to count two, consecutive to count one, whereas Lopez was sentenced to 78 months on count one and 120 months as to count two, consecutive to count one.

II. STANDARDS OF REVIEW

This Court reviews the first issue, sufficiency of the evidence for Appellants' Hobbs Act violations, under a de novo standard of review. *See United States v. Yates*, 438 F.3d 1307, 1311 (11th Cir.2006). The Court also employs a de novo standard of review in analyzing the district court's legal conclusion that 18 U.S.C. § 924(c)(1)(A)(iii) did not contain a separate mens rea requirement. *King v. Moore*, 312 F.3d 1365, 1366 (11th Cir.2002).

III. DISCUSSION

Appellants each contend that the government failed to prove that AmSouth's deposits were insured by the FDIC, which they maintain requires this Court to vacate their convictions. In support of their argument, Appellants claim that exhibit 6, which is the FDIC certification and affidavit of the Assistant Secretary of the FDIC, was testimonial evidence admitted in violation of the Confrontation Clause as set forth in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

To obtain a conviction for conspiring to interfere with interstate commerce through robbery, in violation of the Hobbs Act, 18 U.S.C. § 1951(a), the government need only prove a robbery and effect on commerce. *United States v. Rodriguez*, 218 F.3d 1243, 1244 (11th Cir.2000) (holding "[t]wo elements are essential for a Hobbs Act Prosecution: robbery and an effect on commerce"). At trial, Dean admitted to committing the robbery; thus, the only remaining issue is whether the government sufficiently proved that the robbery affected commerce. Appellants argue that the government did not meet its burden in proving an effect on commerce because the FDIC certificate and supporting affidavit were improperly admitted.

Before turning to the issue of its admissibility, we address whether the FDIC certificate was even necessary to prove a Hobbs Act violation. As discussed supra, a Hobbs Act violation requires proof of a robbery and an effect on commerce. *Id.* To prove an effect on commerce, however, the government is only required to establish "a minimal effect on interstate commerce." *Id.* This Court has held that a "mere depletion of assets" is sufficient proof of an effect on interstate commerce. *Id.*

AmSouth Branch Manager Tanner testified that AmSouth's headquarters were located outside the state of Georgia in Birmingham, Alabama. Tanner also stated the Rome, Georgia branch remained closed following Dean's 10:00 a.m. robbery of $3,642.00. The robbery forced the Rome branch to close and prevented any additional patrons from transacting business for the remainder of the day. This case is similar to *United States v. Guerra*, where an individual stole $300 dollars from a service station, which was subsequently forced to close for two

hours. There, this Court found an effect on interstate commerce and labeled the case a "classic 'depletion of assets' scenario." 164 F.3d 1358, 1361 (11th Cir. 1999). In *Rodriguez*, this Court found an effect on commerce where the perpetrator had robbed a motel because some of the motel guests were from out of state. 218 F.3d at 1244. Given our Hobbs Act sufficiency of evidence jurisprudence, the government's evidence, which included the stealing of $3,642.00 from a bank with interstate branches and that is open to out of state customers, was sufficient to establish an effect on commerce. Further, the stealing of the money depleted AmSouth's cash reserve and thereby affected commerce. This evidence was sufficient to sustain Appellants' convictions for violation of 18 U.S.C. § 1951(a).

Appellants argue that the FDIC certificate and accompanying affidavit were improperly admitted in violation of the Confrontation Clause. Proof of a Hobbs Act violation does not require proof of FDIC insurance. FDIC insured status is an element of armed bank robbery under 18 U.S.C. § 2113, but not of 18 U.S.C. § 1951(a). *See Poole v. United States*, 832 F.2d 561, 564-65 (11th Cir.1987). Appellants claim that *United States v. Sandles* requires reversal based upon the government's alleged erroneous use of the FDIC certificate and accompanying affidavit. 469 F.3d 508 (6th Cir.2006). The situation in *Sandles* is inapposite because there the defendant was charged with armed bank robbery, which, as stated above, requires proof of FDIC insurance. Therefore, it is not necessary for this Court to address Appellants' Confrontation Clause claim surrounding admission of the FDIC certificate and affidavit. Even if the FDIC certificate and affidavit were admitted in error, the error was harmless, as no proof of FDIC insured status was

needed and the government provided separate evidence establishing the Hobbs Act violation. *See United States v. Ndiaye*, 434 F.3d 1270, 1286 (11th Cir.2006) (stating "denial of a defendant's Confrontation Clause right to cross-examination is examined for harmless error").

Furthermore, Appellant Lopez argues that proof of FDIC insured status was necessary for the government to meet its burden with respect to the Hobbs Act's effect on commerce prong. A bank's FDIC status could be relevant to the effect on commerce inquiry, *see United States v. Spinello*, 265 F.3d 150, 156-57 (3d Cir.2001) (bank robbery case), but it is not required here. As discussed above, a mere depletion of assets is sufficient to prove an effect on commerce. Here, the depletion was proven; consequently, proof of FDIC insured status was not necessary because the trial testimony established depletion of assets, bank closure, and out of state branches, which proved the requisite effect on commerce.

Appellants next claim that 18 U.S.C. § 924(c)(1)(A)(iii) requires that the sentencing enhancement for discharge of a firearm applies only to intentional firearm discharges. Testimony at trial supports Dean's assertion that the discharge of the firearm inside the bank was a surprise even to Dean and, thus, was likely accidental. Our Court has not squarely addressed in any published opinion whether a firearm discharge must be intended before the sentencing enhancement is applicable. We now hold that nothing in the language of the statute requires separate proof of intent before applying the sentencing enhancement.

Section 924(c)(1)(A)(iii) is a sentence enhancement and merely reflects factors that will enhance sen-

tencing, not elements of an offense. *Harris v. United States*, 536 U.S. 545, 556, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002). Section 924(c)(1)(A)(iii) states in pertinent part, "any person who . . . uses or carries a firearm . . . shall, in addition to the punishment provided for such crime of violence or drug trafficking crime[,](iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years." The plain language of § 924(c)(1)(A)(iii) requires only a person to "use [ ] or carr[y] a firearm" to be subject to the sentence enhancement; there is no reference to any mens rea requirement. Looking to our case law, we analyzed a similar mens rea sentencing enhancement claim in *United States v. Brantley*, 68 F.3d 1283, 1290 (11th Cir.1995).

Brantley involved possession of a semi-automatic firearm that, unbeknownst to its carrier, had been illegally altered into a fully automatic weapon. *Id.* at 1289. This Court held that the carrier had to have known of the firearm's altered status to be found guilty of carrying an illegal firearm under 26 U.S.C. § 5861(d). *Id.* at 1290. We, however, found that the defendant's conviction under § 924(c) did not require any separate intent. *Id.* This Court differentiated the intent requirements of § 5861 and § 924(c) because it was concerned that removing the mens rea requirement from § 5861 could punish an innocent individual who did not realize the firearm was prohibited. We did not have the same fear of punishing an unknowing individual under § 924(c) because imposition of that sentence enhancement first demands the government prove the defendant engaged in an underlying violent or drug trafficking crime, which will have its own mens rea requirement. *Id.* at 1289-90 (stating "unlike the law abiding individual who unknowingly comes into possession of an illegal fire-

arm, the § 924(c) defendant whose sentence is enhanced based upon the type of weapon he carried has demonstrated a 'vicious will' by committing the principal offense").

In addition to our *Brantley* decision, this Court is also persuaded by the Tenth Circuit's reasoning in *United States v. Nava-Sotelo*, 354 F.3d 1202 (10th Cir.2003). In that case, the brother of an inmate attempted to rescue the inmate on his way back from receiving dental treatment outside of the prison. *Id.* at 1203. In a struggle between the defendant and one of the prison transporting officers, the prison officer grabbed the defendant's gun and as the two were fighting over it, the defendant accidentally discharged the weapon into the ground. *Id.* The Tenth Circuit supported its finding that § 924(c)(1)(A)(iii) did not have an additional mens rea requirement by finding the plain language of the statute did not include any requirement of intent. *Id.* at 1207. Further, the Tenth Circuit stated § 924(c)(1)(A)(iii) lists sentencing enhancements, not elements of an offense, and when the underlying offense requires a vicious will the danger of imposing punishment upon an innocent party is absent. *Id.* Given this reasoning, the *Nava-Sotelo* Court succinctly concluded "[a]ccountability is strict; the mere fact that the weapon discharged is controlling." *Id.* at 1206.

Appellants urge this Court to adopt the D.C. Circuit's reasoning in *United States v. Brown*, 449 F.3d 154 (D.C.Cir.2006), which found § 924(c)(1)(A)(iii) did require intent to discharge in order for a defendant to receive the ten year sentencing enhancement. The D.C. Circuit found that the three subsections of § 924(c) worked in concert to impose increasingly heavier penalties as the defendant's conduct became

more egregious. *Id.* at 156. The D.C. Circuit, therefore, reasoned that § 924(c)(1)(A)(iii) [discharge] must contain an intent requirement because it contains a harsher penalty than § 924(c)(1)(A)(ii) [brandishing]. *Id.* This reasoning is not persuasive because discharging a firearm, regardless of intent, presents a greater risk of harm than simply brandishing a weapon without discharging it. The penalty is an enhancement for conduct that occurred, not intent. The D.C. Circuit also found a mens rea requirement because of the general presumption against strict liability in criminal statutes. This reason is equally unpersuasive as there is a distinction between elements of an offense and sentencing enhancements for conduct during perpetration of a violent criminal act.

Here, despite the evidence that Dean accidentally discharged his pistol during the AmSouth robbery, the district court correctly found that he remained subject to the § 924(c)(1)(A)(iii) sentencing enhancement. Consistent with our reasoning in *Brantley*, Appellants had the vicious will to conspire to commit the underlying crime of robbery in violation of the Hobbs Act, which ensures that they are not innocent individuals unfairly held to a strict liability offense. Finally, adopting the Tenth Circuit's reasoning, Dean's mere discharge of the pistol is controlling. Therefore, the district court did not err in holding that § 924(c)(1)(A)(iii) lacks a separate mens rea requirement.

On appeal, Lopez levied two additional arguments not raised by his codefendant. First, Lopez claims that the district court's jury instruction created an unconstitutional mandatory presumption. Second, he argues that the district court erroneously found that

his prior juvenile armed robbery convictions were not functionally consolidated.

Lopez raises his objection to the district court's jury instruction for the first time on appeal; consequently, this Court reviews the instruction for plain error. *United States v. Vazquez*, 53 F.3d 1216, 1221 (11th Cir.1995). Further, we must review the challenged jury instruction in its entirety. *United States v. Myers*, 972 F.2d 1566, 1573 (11th Cir.1992).

Lopez finds error with the district court's following instruction: "You may find the requisite effect upon interstate commerce has been proven if you find beyond a reasonable doubt that the bank described in the indictment was engaged in doing business both within and without the state of Georgia." Lopez contends that this jury instruction lowers the standard of proof by creating the mandatory presumption that the robbery of the Rome, Georgia branch affected interstate commerce.

A jury instruction which creates a burden shifting presumption or a conclusive presumption deprives a defendant of his right to the due process of the law. *See Sandstrom v. Montana*, 442 U.S. 510, 524, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). An instruction must not relieve the government of its burden of proving each and every element of an offense. *Id.* "The threshold inquiry in evaluating whether a jury instruction impermissibly shifts the burden of proof is whether the instruction is a permissive inference or a mandatory presumption." *Baxter v. Thomas*, 45 F.3d 1501, 1509 (11th Cir.1995). Further, "[a] permissive presumption merely allows an inference to be drawn and is constitutional so long as the inference would not be irrational." *Id.* This Court, in *Myers*, held a permissive inference permits the jury to make

an inference from the evidence proven by the prosecution, but does not mandate any such finding. *United States v. Myers*, 972 F.2d 1566, 1573 (11th Cir.1992) (stating "[t]he district court explicitly informed the jury that it 'may' infer that a person ordinarily intends all the natural and probable consequences of an act . . . . This circuit has approved similar jury instructions that allow the jury to infer intent from the natural and probable consequences of any act.").

In the instant case, the district court similarly instructed the jury that it "may" find an effect upon interstate commerce. *Id.* The court did not create a mandatory presumption through the use of unqualified language such as must or shall. The court also did not relieve the prosecution of its burden because it still required the jury to "find beyond a reasonable doubt that the bank described in the indictment was engaged in doing business both within and without the state of Georgia." The government put into evidence the testimony of Branch Manager Tanner that revealed AmSouth's out of state headquarters and its half-day closure, which provided the jury with the opportunity to reasonably infer an effect upon interstate commerce. Further, the instruction resembles the one we previously upheld in *Myers*. Accordingly, this Court finds that the challenged instruction created a permissive inference, did not relieve the prosecution of proving each and every element beyond a reasonable doubt, and, thus, did not constitute plain error.

Defendant Lopez pled guilty to four counts of armed robbery in the Georgia juvenile court system. Lopez committed five armed robberies over a span of four days in late July, 1997. After the final robbery,

Lopez was arrested and charged separately for the four crimes.[1] Each charge of armed robbery was assigned a separate case number, but one lawyer represented Lopez in each case and a single plea agreement was reached covering all four offenses. In addition, the juvenile court imposed a single sentence for all four robberies at one proceeding. Lopez, based upon these facts, argues his underlying armed robbery adjudications were functionally consolidated and the district court should have treated them as related cases under U.S.S.G. § 4A1.2, Application Note 3(C).

In calculating Lopez's criminal history score, the probation officer assessed two criminal history points for each of the four juvenile armed robberies. These eight points, along with a single point for an adult battery conviction, gave Lopez a total criminal history score of nine, which establishes a criminal history category of IV. Based upon his criminal history category and total offense level, Lopez's guideline range, as to count one, was 77-96 months. On count one, the district court sentenced Lopez to 78 months imprisonment. At sentencing, the district court judge also stated that he still would have imposed a term of 78 months imprisonment as a reasonable sentence, regardless of any guidelines miscalculation, because of the facts of the case and defendant's misleading and shifting testimony offered in an effort to hide the truth. Lopez contends that he should have received only two points for the four armed robberies because he was sentenced only once. This one robbery charge, in addition to the adult battery charge, would have given him a criminal

[1] Two of the robberies were charged in a single petition, which made the two charges proper for consolidation as one armed robbery.

history score of 3, a criminal history category of II, and a guideline range of 57-71 months.

This Court need not address Lopez's specific arguments surrounding the alleged failure to consolidate his juvenile offenses because, as we held in *United States v. Keene*, where the district court imposes a reasonable sentence and states that it would impose the same sentence irrespective of any sentencing calculation errors, this Court will uphold the sentence rather than "send the case back to the district court since it has already told us that it would impose exactly the same sentence, a sentence we would be compelled to affirm." 470 F.3d 1347, 1350 (11thCir.2006).

Here, like *Keene*, the district court stated it would have imposed 78 months as a reasonable sentence based on the 18 U.S.C. § 3553(a) imposition of a sentence factors. According to our decision in *Keene*, the relevant analysis is as follows: "the question then is whether the [78-month] sentence the court imposed is reasonable, assuming exactly the same conduct and other factors in the case, but using an advisory range of [57-71] months."[2] 470 F.3d at 1350. In this case, Lopez's 78-month sentence was reasonable under the § 3553(a) factors because his criminal record and current offense show a disregard for the law, obstruction of justice and falsity, danger to the public, and a need to deter future transgressions. Therefore, the district court's imposition of Lopez's 78-month sentence was reasonable and stands despite the disputed guidelines issue.

[2] This analysis assumes that the district court should have awarded Lopez a criminal history score of 3, which would have generated a criminal history category of II, leaving him with a guideline range of 57-71 months imprisonment.

IV. CONCLUSION

The district court judgment is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Feb. 20, 2008]

No. 06-14918
District Court Docket No.
04-00072-CR-HLM-4

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CHRISTOPHER MICHAEL DEAN,
RICARDO CURTIS LOPEZ,
Defendants-Appellants.

[SEAL]

Appeal from the United States District Court
for the Northern District of Georgia

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: February 20, 2008
For the Court: Thomas K. Kahn, Clerk
By: Jackson, Jarvis

[Issued as Mandate
Apr. 24, 2008]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Apr. 15, 2008]

No. 06-14918-EE

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CHRISTOPHER MICHAEL DEAN,
RICARDO CURTIS LOPEZ,
Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Georgia

BEFORE: HULL and PRYOR, Circuit Judges, and MOORE,* District Judge.

PER CURIAM:

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
UNITED STATES CIRCUIT JUDGE

* Honorable K. Michael Moore, United States District Judge for the Southern District of Florida, sitting by designation.

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
JAN 5 - 2009
OFFICE OF THE CLERK

No. 08-5274

IN THE

Supreme Court of the United States

CHRISTOPHER MICHAEL DEAN
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE PETITIONER

JEFFREY T. GREEN
QUIN M. SORENSON
AMY L. HANKE
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

SCOTT J. FORSTER*
P.O. Box 102
Calhoun, GA 30703
(706) 625-1799

Counsel for Petitioner
* Counsel of Record

January 5, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether 18 U.S.C. § 924(c)(1)(A)(iii), establishing a ten-year mandatory minimum sentence for a defendant who "discharge[s]" a firearm during a crime of violence, requires proof that the discharge was volitional, and not merely accidental, unintentional, or involuntary.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. SECTION 924(C)(1)(A)(III) INCORPORATES A GENERAL INTENT ELEMENT	7
A. The Statutory Language Includes a General Intent Element	7
B. The Legislative History Supports a General Intent Element	15
II. THE PRESUMPTION OF *MENS REA* REQUIRES INCORPORATION OF A GENERAL INTENT ELEMENT IN § 924(C)(1)(A)(III)	25
III. THE RULE OF LENITY REQUIRES THAT § 924(C)(1)(A)(III) BE INTERPRETED TO INCLUDE A GENERAL INTENT ELEMENT	36
CONCLUSION	39

TABLE OF AUTHORITIES

CASES Page

Albernaz v. *United States*, 450 U.S. 333 (1981) 30
Apprendi v. *New Jersey*, 530 U.S. 466 (2000) 31
Bailey v. *United States*, 516 U.S. 137 (1995) 12, 19
Bifulco v. *United States*, 447 U.S. 381 (1980) 32, 37, 38
Carter v. *United States*, 530 U.S. 255 (2000) ..... *passim*
Davis v. *United States*, 160 U.S. 469 (1895) 26
Ellis v. *United States*, 206 U.S. 246 (1907) 18
Harris v. *United States*, 536 U.S. 545 (2002) 14, 30, 35
Ladner v. *United States*, 358 U.S. 169 (1958) 37
Liparota v. *United States*, 471 U.S. 419 (1985) 26, 30, 32, 33
Morissette v. *United States*, 342 U.S. 246 (1952) 26, 27, 29, 30, 32
Muscarello v. *United States*, 524 U.S. 125 (1998) 9
Robinson v. *California*, 370 U.S. 660 (1962) 31
Russello v. *United States*, 464 U.S. 16 (1983) 14
Smith v. *United States*, 508 U.S. 223 (1993) 5, 8, 9, 11, 18
Staples v. *United States*, 511 U.S. 600 (1994) ..... *passim*
United States v. *Avery*, 295 F.3d 1158 (10th Cir. 2002) 11

TABLE OF AUTHORITIES continued

Page

United States v. *Barber*, 594 F.2d 1242 (9th Cir. 1979) 16
United States v. *Brown*, 449 F.3d 154 (D.C. Cir. 2006) ..... *passim*
United States v. *Burke*, 888 F.2d 862 (D.C. Cir. 1989) 32
United States v. *Combs*, 369 F.3d 925 (6th Cir. 2004) 10, 11
United States v. *Dahlman*, 13 F.3d 1391 (10th Cir. 1993) 9, 18
United States v. *Freed*, 401 U.S. 601 (1971) 29
United States v. *Granderson*, 511 U.S. 39 (1994) 6, 38
United States v. *Gutierrez*, 978 F.2d 1463 (7th Cir. 1992) 9, 18
United States v. *Iiland*, 254 F.3d 1264 (10th Cir. 2001) 9, 11
United States v. *Lanier*, 520 U.S. 259 (1996) 32
United States v. *Nava-Sotelo*, 354 F.3d 1202 (10th Cir. 2003) 13, 33, 35
United States v. *Nelson*, 733 F.2d 364 (5th Cir. 1984) 16
United States v. *Santeramo*, 45 F.3d 622 (2d Cir. 1995) 8, 9, 18
United States v. *Santos*, 128 S. Ct. 2020 (2008) 33, 37
United States v. *Stewart*, 779 F.2d 538 (9th Cir. 1985) 17
United States v. *U.S. Gypsum Co.*, 438 U.S. 422 (1978) 27, 31, 32, 36, 37
United States v. *Williams*, 344 F.3d 365 (3d Cir. 2003) 9

TABLE OF AUTHORITIES continued

Page

United States v. *Wilson*, 884 F.2d 174 (5th Cir. 1989) 17
United States v. *X-Citement Video, Inc.*, 513 U.S. 64 (1994) 10, 25, 26, 29, 33

STATUTES

Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 ..... 15, 16
Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 ..... 16, 17
Firearm Owners' Protection Act of 1986, Pub. L. No. 99-308, 100 Stat. 449 17
Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 18
Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 ..... 18, 19
Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 19
18 U.S.C. § 924(c)(1) 2, 8, 10, 11, 13
18 U.S.C. § 924(c)(4) 14, 29
18 U.S.C. § 924(j) 14
18 U.S.C. § 1951(a) 3

LEGISLATIVE HISTORY

S. 191, 105th Cong. (1997) 21
H.R. 424, 105th Cong. (1997) ..... 19, 20 ,21
Violent and Drug Trafficking Crimes: The Bailey Decision's Effect on Prosecutions Under 924(c): Hearing Before the S. Comm. on the Judiciary, 104th Cong. 1 (1996) 19

TABLE OF AUTHORITIES continued

Page

H.R. Rep. No. 98-1030 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182 17
H.R. Rep. No. 99-495 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1327 ..... 17, 18, 27, 31
H.R. Rep. No. 105-344 (1997) ..... *passim*
144 Cong. Rec. S12,671 (daily ed. Oct. 16, 1998) 25
144 Cong. Rec. H531 (daily ed. Feb. 24, 1998) 24
144 Cong. Rec. H10,329 (daily ed. Oct. 9, 1998) 22
144 Cong. Rec. H10,330 (daily ed. Oct. 9, 1998) 22, 23, 24

SCHOLARLY AUTHORITIES

Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 Colum. L. Rev. 269 (1996) 36
Stephen J. Morse, *Inevitable Mens Rea*, 27 Harv. J.L. & Pub. Pol'y 51 (2003) 32
Francis Bowes Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55 (1933) 28
J.W. Cecil Turner, *Assault at Common Law*, 7 Cambridge L.J. 56 (1939) 29

OTHER AUTHORITIES

American Heritage Book of English Usage (1996) 10, 15

TABLE OF AUTHORITIES continued

Page

Remarks on Signing Legislation To Provide Educational Assistance to Families of Slain Officers and Strengthening Penalties for Criminals Using Guns, 34 Weekly Comp. Pres. Doc. 2307 (Nov. 13, 1998) 22

4 William Blackstone, *Commentaries* 26

Wm. L. Clark & Wm. L. Marshall, *A Treatise on the Law of Crimes* (1905)..... 29

Edward Coke, *The Third Part of the Institutes of the Laws of England* (William S. Hein Co. 1986) 26

Oliver Wendell Holmes, Jr., *The Common Law* (1881)..... 36

T.W. Hughes, *A Treatise on Criminal Law and Procedure* (1919) 29

Wayne R. LaFave & Austin W. Scott, Jr., *Criminal Law* § 3.2(c) (2d ed. 1986)..... 36

Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 Sup. Ct. Rev. 107... 32

Jack B. Weinstein & Fred A. Bernstein, *The Denigration of Mens Rea in Sentencing*, 7 Fed. Sent'g Rep. 121 (1994)..... 32

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reprinted in the Joint Appendix at J.A. 133. It is also available at 517 F.3d 1224. The District Court for the Northern District of Georgia did not issue a written opinion.

JURISDICTION

The Eleventh Circuit entered its judgment on February 20, 2008, see J.A. 148, and denied a petition for rehearing on April 15, 2008, see J.A. 149. The petition for a writ of certiorari was filed on July 11, 2008, and granted on November 14, 2008. The jurisdiction of this Court rests on 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

Section 924(c)(1)(A) of Title 18 of the United States Code provides:

> Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime –
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 924(c)(1)(A).

STATEMENT OF THE CASE

Christopher Michael Dean was sentenced to a mandatory minimum ten-year term of imprisonment under 18 U.S.C. § 924(c)(1)(A)(iii) based on the finding that, during the crime of which he was convicted, a firearm was "discharged." J.A. 103, 118, 135-36. This sentence was imposed despite evidence, undisputed by the government and accepted by the lower courts, that the discharge was accidental. *Id.* at 139-42, 158. Because § 924(c)(1)(A)(iii) applies only when the firearm was discharged knowingly, and not merely by accident or mistake, the judgment was in error and must be reversed.

1. The robbery from which this case arose occurred in the late morning of November 10, 2004. A masked man entered a bank in Rome, Georgia, brandished a small pistol, and told everyone to get on the floor. *Id.* at 16-19, 27-29, 77-79, 134-36. He walked behind the teller counter and started collecting money from the stations, picking up bills with his left hand and holding the pistol with his right. *Id.*

It was then that the accident occurred. As the perpetrator attempted to switch the gun from one hand to the other, it inadvertently discharged. *Id.* The bullet went through a partition, ricocheted off a computer, and landed on the teller counter. The

perpetrator was visibly shocked, as bank employees later testified. *Id.* at 18-19, 22-24, 47-48, 55, 77-79. He uttered an expletive and immediately left the bank, taking approximately $3,642.00. None of the persons inside the bank were harmed. *Id.* at 18-20.

Local police soon arrested two suspects in the robbery: Christopher Michael Dean and Ricardo Curtis Lopez. These men were brothers-in-law who lived in the same apartment, along with Mr. Lopez's wife (Mr. Dean's sister). Both of them roughly matched the description of the perpetrator, and both were apprehended at or near the car used during the robbery. *Id.* at 31-40, 74-75.

The investigation then took an odd turn: Each man confessed to the crime and exonerated the other. At first, Mr. Lopez said that he had committed the robbery, and that Mr. Dean had not been involved. *Id.* at 75-76. Later, however, Mr. Dean admitted that he had committed the theft, without the knowledge of Mr. Lopez. He explained that Mr. Lopez was trying to take the blame for the crime in order to protect Mr. Dean and his family from the stress of a lengthy period of incarceration. *Id.* at 80-81. Mr. Dean said that he was coming forward because he "couldn't have [Mr. Lopez] going to prison for 10 years for something that [Mr. Lopez] was not guilty of." Mr. Lopez subsequently acknowledged that Mr. Dean had in fact committed the offense. *Id.* at 75-76, 80-81.

Prosecutors, however, charged both Mr. Dean and Mr. Lopez with conspiracy to commit a robbery affecting interstate commerce, in violation of the Hobbs Act, 18 U.S.C. § 1951(a), and aiding and abetting another in using, carrying, possessing, and discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(iii). J.A. at 11-12.

2. Both men were tried before a jury in May 2006 in the Northern District of Georgia. They testified consistently that Mr. Dean had committed the robbery without the assistance or involvement of Mr. Lopez. *Id.* at 75-76, 80-81. Mr. Dean reiterated that the firearm had been discharged inadvertently, a fact corroborated by the prosecution's testifying eye witnesses. The jury returned a verdict of guilty for both defendants on both counts. *Id.* at 82, 136.

The presentence report recommended that Mr. Dean was subject to the mandatory ten-year minimum term of imprisonment under § 924(c)(1)(A)(iii) because the firearm had been "discharged." Defense counsel objected on the ground that the discharge had been accidental. *Id.* at 94-99, 156-58, 164. The district court did not disagree with this characterization, but held that § 924(c)(1)(A)(iii) applies even to an unintentional discharge. It therefore sentenced Mr. Dean to the mandatory minimum term of imprisonment of ten years under § 924(c)(1)(A)(iii), to be served consecutive to any other sentence imposed.[1] *Id.* at 103, 118, 124-26.

The Eleventh Circuit affirmed. It acknowledged that "[t]estimony at trial supports [the] assertion that the discharge of the firearm . . . was likely accidental" – a finding the government did not dispute. *Id.* at 139, 147. Nonetheless, it held that, because "§ 924(c)(1)(A)(iii) does not contain a separate intent requirement," the "mere discharge of [the firearm] is controlling" and mandates application of the ten-year mandatory minimum sentence. *Id.* at 134-42.

[1] Mr. Dean was also sentenced to a 100-month term of imprisonment for his conviction under the Hobbs Act of conspiracy to commit bank robbery. His total sentence of imprisonment was 220 months. J.A. 124-26.

SUMMARY OF ARGUMENT

The judgment below, holding that § 924(c)(1)(A)(iii) applies even when the firearm was discharged unintentionally, contravenes all relevant canons of construction. It ignores the plain meaning of the statutory language, which requires proof of intent, in favor of an interpretation that runs counter to Congress's expectations. It refuses to read a *mens rea* requirement into the provision despite settled doctrine presuming that criminal statutes incorporate such a requirement. And it adopts a construction which imposes substantial additional penalties on the defendant even though the rule of lenity demands that a statute whose meaning is doubtful be interpreted in the manner most favorable to the defense.

The statutory language itself compels an interpretation contrary to that of the Eleventh Circuit. The ten-year mandatory minimum sentence of § 924(c)(1)(A)(iii) applies only when the firearm was discharged "in relation to" a crime of violence. Inherent in that phrase is a requirement that the discharge be for the purpose of facilitating the offense, not merely accidental or involuntary. *Smith* v. *United States*, 508 U.S. 223, 237-38 (1993). This interpretation renders subparagraph (iii) consistent with other provisions of the statute – which prescribe lesser minimum sentences for "us[ing] or carry[ing]" and "brandish[ing]" a firearm, and which undoubtedly require proof of intent – and accords with the statute's purpose of imposing increased mandatory minimum punishment only for increasingly culpable conduct. This reading is further supported by legislative reports and statements reflecting Congress's understanding that

§ 924(c)(1)(A)(iii) would apply only when the conduct was done "knowingly."

Incorporation of an intent requirement is also mandated by the presumption of *mens rea*. That doctrine holds that a criminal statute will be read to require proof of general intent – *i.e.*, proof that the criminal act was committed knowingly and not by accident or mistake – "absent a clear statement from Congress that *mens rea* is not required." *Staples* v. *United States*, 511 U.S. 600, 605-06, 618 (1994). No such statement exists in this case, either in the statute or the legislative record. To the contrary, all available material demonstrates that Congress understood and intended that a *mens rea* element would be read into § 924(c)(1)(A)(iii).

Any doubts that might remain over the proper interpretation of the statute are resolved by the rule of lenity. That rule requires that, "where text, structure, and history fail to establish that the Government's position is unambiguously correct," any statutory ambiguity must be resolved in the defendant's favor. *United States* v. *Granderson*, 511 U.S. 39, 54 (1994). The "text, structure, and history" of § 924(c)(1)(A)(iii), far from showing the government's position to be "unambiguously correct," demonstrate beyond doubt that the government is wrong. Nevertheless, even if the statute could still somehow be deemed "ambiguous," the rule of lenity mandates adoption of the interpretation most favorable to the defendant, requiring proof of knowing misconduct.

The Eleventh Circuit misapplied these canons of construction. Contrary to its decision, the ten-year mandatory minimum sentence under § 924(c)(1)(A)(iii), for discharging a firearm during and in relation to a crime of violence, can be applied

only when the firearm is discharged knowingly, and not by accident or mistake. The judgment of the Eleventh Circuit should be reversed, with instructions to remand for resentencing.

ARGUMENT

I. SECTION 924(C)(1)(A)(III) INCORPORATES A GENERAL INTENT ELEMENT.

The language and history of § 924(c)(1)(A)(iii) demonstrate that it incorporates a general intent element. Congress included a scienter requirement in the principal paragraph, through the phrase "in relation to," and the statute's syntax and structure show that this requirement applies to the "discharge" provision, demanding proof that the defendant acted at least knowingly, and not by accident or mistake.

A. The Statutory Language Includes a General Intent Element.

The text of § 924(c)(1)(A), the "starting place" of any interpretive inquiry, *Staples* v. *United States*, 511 U.S. 600, 605-06, 618 (1994), clearly includes a general intent element. That provision states, in part, as follows:

> any person who, *during and in relation to* any crime of violence or drug trafficking crime[,] . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime –
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 924(c)(1)(A) (emphasis added). The phrase "in relation to" necessarily embodies a *mens rea* requirement, and must be read to require that any of the prohibited acts in the statute – including "discharge" of a firearm – be committed knowingly.

1. The meaning of the phrase "in relation to" was addressed in *Smith* v. *United States*, 508 U.S. 223 (1993). That phrase clarifies, the Court held, that the firearm must "at a minimum" have some "purpose or effect" with respect to the underlying crime and that its use or presence "cannot be the result of *accident or coincidence*." *Id.* at 237-38 (emphasis added). In other words, the use of the firearm must "facilitat[e], or ha[ve] the potential of facilitating," the underlying offense. *Id.* at 238 (quoting *United States* v. *Stewart*, 779 F.2d 538, 539 (9th Cir. 1985) (Kennedy, J.)).

Implicit in this definition is a requirement that the firearm be used knowingly. An accidental or involuntary act can hardly be said to "facilitate" an offense.[2] Only if the defendant used the gun knowingly, not merely by accident, can that use be deemed "in relation to" the crime. See *United States* v. *Santeramo*, 45 F.3d 622, 624 (2d Cir. 1995) (per curiam) ("[C]learly, a person cannot have possession

[2] This point is illustrated by the facts of this case. When the firearm accidentally discharged during the bank robbery, the perpetrator yelled an expletive, stopped collecting money, and ran from the bank. J.A. 18-19, 22-24, 47-48, 55, 77-79. Thus, far from "facilitating" the crime, the unexpected discharge of the firearm apparently resulted in a premature end to the robbery, forcing a rushed exit from the premises and preventing the accumulation of additional cash.

or control of a firearm and allow the firearm to play a role in the crime unless the person knew of the firearm's existence.") (quoting *United States* v. *Gutierrez*, 978 F.2d 1463, 1467 (7th Cir. 1992)). Circuit courts have so held, concluding that the phrase "fairly imports [a] knowledge requirement." *Id.*; see *United States* v. *Dahlman*, 13 F.3d 1391, 1400 (10th Cir. 1993) ("The language 'during and in relation to' is the equivalent of or meets the scienter requirements of knowledge . . . ."); *United States* v. *Gutierrez*, 978 F.2d 1463, 1467 (7th Cir. 1992) (agreeing that "'during and in relation to' necessarily include[s] a knowledge requirement").

This interpretation, beyond flowing from the plain meaning of "in relation to," is necessary to avoid rendering that phrase superfluous. The statute applies only when a firearm was used "*both* 'during *and* in relation to' a drug crime." *Muscarello* v. *United States*, 524 U.S. 125, 137 (1998) (quoting 18 U.S.C. § 924(c)(1)); see *United States* v. *Williams*, 344 F.3d 365, 371 (3d Cir. 2003). The term "during" covers the necessary temporal relationship between the use of the firearm and the underlying crime, so the only job for "in relation to" to perform is to prescribe the necessary causal connection: *i.e.*, requiring that the firearm be used for the *purpose* of facilitating the offense. *Smith*, 508 U.S. at 237-38; see *United States* v. *Iiland*, 254 F.3d 1264, 1274 (10th Cir. 2001) ("[M]erely carrying the gun during the crime is not enough to meet the 'during and in relation to' element unless the government proves the defendant *intended* the weapon to be available for use during the crime.") (emphasis added). Only if "in relation to" is interpreted to include a *mens rea* element can the phrase be given independent meaning and effect.

2. It is equally clear that the "in relation to" modifier, with its scienter requirement, applies not only to the "use or carry" provision of § 924(c)(1)(A) but also to the "brandish" and "discharge" provisions of subparagraphs (ii) and (iii). When a modifier is antecedent to a series of verbs, it is properly construed to apply to each of the verbs in the series. *American Heritage Book of English Usage* 53 (1996); cf. *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 68 (1994) (applying "knowingly" to subsequent terms in statute). The adverbial phrase "in relation to" in § 924(c)(1)(A) appears before a series of verbs that constitute the *actus reus* of the provisions, including "use," "carry," "possess," "brandish," and "discharge." 18 U.S.C. § 924(c)(1)(A). That phrase must therefore be construed to apply to all of these acts, requiring that they be performed knowingly. Cf. *X-Citement Video*, 513 U.S. at 68-69.

The fact that the series of verbs is interrupted by a separate modifying clause, prohibiting "possess[ion]" of a firearm "in furtherance of" a crime, does not change this conclusion. First, the possession clause is set off from the remainder of the statute by commas, suggesting that it is grammatically distinct from the other provisions. That clause must therefore be treated as a separate prong, which does not affect the interpretation of other provisions.[3] Cf. *United States*

[3] The explanation for the somewhat awkward phrasing of the statute, as well as confirmation that "in relation to" modifies the "brandish" and "discharge" provisions, is found in the statute's legislative history, as described below. *See infra* Part I.B.2 (discussing prior bills); *cf. X-Citement Video*, 513 U.S. at 73-74 ("The legislative history of the statute evolved over a period of years, and perhaps for that reason speaks somewhat indistinctly to the question whether 'knowingly' in the statute modifies the elements of (1)(A) and (2)(A) . . . .").

v. *Combs*, 369 F.3d 925, 931 (6th Cir. 2004) (discussing possession clause and concluding that it enumerates a separate offense). Second, "brandish" and "discharge" represent ways in which a firearm is "used," beyond mere possession. *Smith*, 508 U.S. at 237-38. It therefore makes sense to apply to these provisions the same modifier that applies to "use": *i.e.*, "in relation to."[4]

The phrasing of subparagraphs (ii) and (iii) supports this construction. Those provisions impose an increased, consecutive mandatory minimum sentence whenever the firearm "is brandished" or "is discharged." 18 U.S.C. § 924(c)(1)(A). The subparagraphs, standing alone, obviously do not themselves define the period in which the firearm must be used, or instruct whether or how the firearm's use must be linked to the underlying crime. The simplest and most natural way to fill this gap is to rely on the "during and in relation to" language in the principal paragraph. Incorporating this modifier into subparagraphs (ii) and (iii) provides the temporal and causal limitation that is necessary but otherwise lacking.

A contrary interpretation would produce absurd results. Considered in isolation, subparagraphs (ii) and (iii) would apply *whenever* the gun at issue "is brandished" or "is discharged," regardless of when

[4] The statute's interpretation would not change if "in furtherance of," instead of "in relation to," were deemed to modify "brandish" and "discharge." Several courts have recognized that these phrases carry substantially the same meaning. *United States* v. *Avery*, 295 F.3d 1158, 1174-75 (10th Cir. 2002); *see also, e.g.*, *Iiland*, 254 F.3d at 1271-74 (concluding that "in furtherance of" is a "slightly higher standard" which "encompasses the 'during and in relation to' language") (quoting H.R. Rep. No. 105-344, at 9 (1997)).

the actions occur, or by whom or for what reason they are taken. This would presumably mean that a defendant could be sentenced under subsection (iii) if the gun used during the crime had been discharged at some point long before or after the offense, or if it was appropriated and discharged by another person during the offense – even by a police officer in self-defense. See *United States* v. *Brown*, 449 F.3d 154, 157 (D.C. Cir. 2006) (noting that, without an intent element, the discharge provision of § 924(c) might "render an armed robber liable for the discharge by a law enforcement officer or bank teller who got a hold of the robber's gun and used it to threaten the robber" or "if a defendant's weapon accidentally discharged when he dropped it to comply with a police request to do so"); cf. *Carter* v. *United States*, 530 U.S. 255, 269 (2000) (interpreting statute prohibiting taking of money by force to incorporate *mens rea* requirement to avoid application "to the hypothetical person who engages in forceful taking of money while sleepwalking"). It is inconceivable that Congress would have intended, without an express statement of purpose, to punish individuals for the actions of another person or for conduct unrelated to the underlying crime. To avoid this result, the statute must be interpreted to read "in relation to," with its *mens rea* element, as modifying "brandish" and "discharge" in § 924(c)(1)(A).

3. The structure of the statute supports this construction. See *Bailey* v. *United States*, 516 U.S. 137, 145 (1995) ("We consider not only the bare meaning of the [language] but also its placement and purpose in the statutory scheme."). There is no doubt that the mandatory minimum sentences of subparagraphs (i) and (ii) apply only if the proscribed conduct was performed knowingly. *Brown*, 449 F.3d

at 156; see *United States* v. *Nava-Sotelo*, 354 F.3d 1202, 1205 (10th Cir. 2003). It follows, then, that the mandatory minimum sentence of subparagraph (iii) applies only if the conduct was committed "during and in relation to" the underlying crime, and therefore knowingly.

This construction would best serve the statute's purpose. Section 924(c)(1)(A) imposes increasingly harsh punishment for increasingly culpable conduct: for possessing, using, or carrying a firearm, the statute mandates a five-year minimum sentence; for brandishing a firearm, a seven-year sentence; and for discharging a firearm, a ten-year sentence. 18 U.S.C. § 924(c)(1)(A). Each increase in the minimum term of imprisonment is linked to conduct that is increasingly blameworthy. *Brown*, 449 F.3d at 156; see also H.R. Rep. No. 105-344, at 6 (1997) (stating that the bill imposes "increased penalties for escalating egregious conduct"). It is therefore consistent with the structure of the statute to apply those increases only in response to knowing (and escalating) misconduct.

The escalating mandatory minimum sentences for misconduct specified in the statute are not explained solely by the increased risk of harm inherent in such conduct, independent of greater culpability. This fact is most clearly demonstrated by the statute's definition of "brandish":

> to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.[5]

[5] That § 924(c) explicitly defines "brandish" to require proof of a particular intent ("in order to intimidate") hardly suggests, as

18 U.S.C. § 924(c)(4). Thus, under the statute, an individual "brandishes" a firearm when he or she merely informs another person of its presence, see *id.*, or wears the weapon in the ordinary course of business, cf. *Harris* v. *United States*, 536 U.S. 545, 556 (2002), even though this conduct does not, in and of itself, increase the risk of harm to others. The statute focuses not on risk, but on the defendant's culpability.[6] Cf. 18 U.S.C. § 924(j) (authorizing

the government claims, that "discharge" cannot be read to incorporate a general intent element. To the contrary, the fact that Congress defined the *particular* intent necessary to constitute "brandishing," without even mentioning the requisite *general* intent, strongly implies that Congress understood that a general intent element had already been incorporated into subparagraphs (ii) and (iii). *See Brown*, 449 F.3d at 157. Considered in this light, the "in order to intimidate" language does not add a scienter element where none previously existed but, rather, supplements the already-present general intent element with an additional, specific intent requirement. *See id.* ("The statute's definition of 'brandish' is broader than the dictionary definition . . . . Having embarked on a definition, the drafter thought it proper to specify the required intent.") (internal citations omitted). While the inclusion of this language in the definition of "brandish" may suggest that no similar specific intent requirement should be read into the definition of "discharge," *see Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion and exclusion."), it in no way conflicts with incorporation of a general intent element and certainly cannot be viewed as an affirmative choice to dispense wholly with the requirement of *mens rea*.

[6] Use of the passive voice in subparagraphs (ii) and (iii) ("is brandished" and "is discharged") does not imply that those provisions operate without regard to intent. First, as used in the statute, "brandish" and "discharge" are transitive verbs; they require a subject to act upon an object – in this case, an individual to act upon a firearm, causing it either to be

higher penalties for any person "who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm").

It is inconsistent with § 924(c)(1)(A) to subject an individual who acted unintentionally, and cannot be deemed morally culpable, to increased mandatory minimum punishment. *Brown*, 449 F.3d at 156-57. Particularly because the increase in sentence for "discharging" a firearm is so substantial – three additional years' mandatory imprisonment – and plainly associated with escalating criminality, it should be interpreted to apply only when the act was committed knowingly. *Id.*

B. The Legislative History Supports a General Intent Element.

The legislative history confirms that Congress expected § 924(c)(1)(A)(iii) to be interpreted, in accordance with its plain language and structure, to require proof of general intent.

1. The statute has always included some form of intent requirement. The original version of § 924(c), enacted as part of the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, provided as follows:

"brandished" or "discharged." *American Heritage Book of English Usage*, *supra*, § 70. Congress could have mandated an increased penalty whenever the firearm "discharges," a simpler (intransitive) verb form which might cover any case where the firearm happened to expel a bullet, regardless of the cause. That Congress instead used the transitive form, "is discharged," suggests that an intentional act is required. *See id.* Second, in light of the statutory definition of "is brandished," as used in subparagraph (ii) (which circumscribes that transitive verb to volitional acts), the parallel construction in the next subparagraph ((iii), "is discharged"), even though also phrased in the passive voice, weighs heavily in favor of reading an intent requirement into that subparagraph as well. *See supra* note 5.

> (c) Whoever –
>
> (1) uses a firearm *to commit any felony* for which he may be prosecuted in a court of the United States, or
>
> (2) carries a firearm *unlawfully during the commission of any felony* for which he may be prosecuted in a court of the United States,
>
> shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than 10 years.

Id. § 102 (emphasis added). The highlighted phrases both reflect an element of intent. A defendant cannot be said to use a gun "to commit a felony" if he or she has no awareness of the gun's usage; likewise, a defendant cannot be deemed to carry a gun "unlawfully during . . . [a] felony" when he or she has no knowledge of its presence. See *United States* v. *Nelson*, 733 F.2d 364, 370-71 & n.15 (5th Cir. 1984) (requiring proof of knowing conduct); *United States* v. *Barber*, 594 F.2d 1242, 1244 (9th Cir. 1979) (same).

That intent element was retained when the statute was amended by the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837. The amended statute stated, in relevant part:

> Whoever, *during and in relation to any crime of violence*, . . . for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment for such crime of violence, be sentenced to imprisonment for five years.

Id. § 1005 (emphasis added). The amendment combined the "use" and "carry" subsections, and replaced the phrases "to commit any felony" and

"unlawfully during the commission of any felony" with a single, common modifier: "during and in relation to." *Id.*

Inherent in the new language was the same intent element that had existed in the prior version. *United States* v. *Stewart*, 779 F.2d 538, 539 (9th Cir. 1985) (Kennedy, J.) ("[T]he 'in relation to' language was not intended to create an element of the crime that did not previously exist, but rather was intended to make clear a condition already implicit in the statute."); see *United States* v. *Wilson*, 884 F.2d 174, 178-79 (5th Cir. 1989) (same). Congress eliminated the modifier "unlawfully" not because it wanted to remove a *mens rea* component or impose strict liability, but because it wanted to remove protection for "policemen and persons licensed to carry firearms who committed Federal felonies," see H.R. Rep. No. 98-1030, at 314 n.10 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182 – without extending the statute's scope beyond those persons who carry or use a firearm for the *purpose* of facilitating a federal crime. *Stewart*, 779 F.2d at 539. The "during and in relation to" language achieved this goal, limiting the statute's applicability to cases in which the defendant purposefully "chose" to use or carry a firearm – whether lawfully or not – and "intended" that it would facilitate the crime. H.R. Rep. No. 98-1030, at 314 & n.10.

The statute was amended again in 1986, to extend its coverage to "drug trafficking crime[s]" in addition to "crime[s] of violence." Firearm Owners' Protection Act of 1986, Pub. L. No. 99-308, § 104, 100 Stat. 449, 456. The "during and in relation to" modifier was retained, and there is no indication that Congress disagreed with judicial holdings that the statute applies only when the firearm was carried or used "knowingly." See H.R. Rep. No. 99-495, at 25-29

(1986), *reprinted in* 1986 U.S.C.C.A.N. 1327. To the contrary, a committee report acknowledged these decisions and stated that, with respect to the Gun Control Act, "[i]t is the Committee's intent, that unless otherwise specified, the knowing state of mind shall apply to circumstances *and* results." *Id.* at 25-26 (emphasis added). The report noted that "[t]his comports with the usual interpretations of the general intent requirements of current law." *Id.* (citing *United States* v. *Bailey*, 444 U.S. 394, 405 (1980)).[7]

Over the next decade, courts continued to interpret the statute to incorporate a knowledge element. *Santeramo*, 45 F.3d at 624; *Dahlman*, 13 F.3d at 1400; *Gutierrez*, 978 F.2d at 1467. Most notably, as discussed above, this Court held in *Smith* that the phrase "in relation to" requires that the firearm have some "purpose or effect" with respect to the underlying crime and that its use "[not] be the result of accident or coincidence." 508 U.S. at 237-38. Congress never questioned or legislatively challenged these decisions, allowing the material language to remain unchanged in the three amendments to § 924(c) passed during this period.[8]

[7] The report quoted a definition of "general intent" offered in an opinion by Justice Holmes: "If a man intentionally adopts certain conduct in certain circumstances known to him, and that conduct is forbidden by the law under those circumstances, he intentionally breaks the law in the only sense in which the law ever considers intent." *Ellis* v. *United States*, 206 U.S. 246, 257 (1907), *quoted in* H.R. Rep. No. 99-495, at 26 n.21.

[8] The statute was amended in 1988 to expand the definition of "drug trafficking crime," *see* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6212, 102 Stat. 4181, 4360, in 1990 to increase the punishment for use of a short-barreled rifle or shotgun and to include "destructive device[s]" in the definition of "firearm," *see* Crime Control Act of 1990, Pub. L. No. 101-647, § 1101, 104

2. The only relevant decision to which Congress did react was the Court's opinion in *Bailey* v. *United States*, 516 U.S. 137 (1995). The question in *Bailey* was whether a defendant could be convicted under § 924(c)(1) for "use" of a firearm when the gun was possessed by the defendant near the crime but was not utilized during the offense. *Id.* at 138-39. The Court answered that question in the negative. *Id.* at 143. Reading the term "use" in § 924(c)(1) to require proof of "active employment," it stated that, "[t]o sustain a conviction under the 'use' prong of § 924(c)(1), the Government must show that the defendant actively employed the firearm during and in relation to the predicate crime." *Id.* at 143, 150.

Legislative response to *Bailey* was swift. Several bills were soon introduced to state explicitly that § 924(c)(1) applies when a firearm is "possessed" in relation to a federal crime, regardless of whether it is actively employed. *Violent and Drug Trafficking Crimes: The Bailey Decision's Effect on Prosecutions Under 924(c): Hearing Before the S. Comm. on the Judiciary*, 104th Cong. 1 (1996) (noting pending bills). At the same time, legislators decided to increase the penalty for individuals who "discharge" a gun in connection with the crime. *Id.* at 2-4 (statement of Sen. Helms).

Two principal bills were reported: H.R. 424 and S. 191. The House bill proposed to eliminate the "use or carry" language altogether, replacing it with separate prohibitions on "possessing," "brandishing" and "discharging." H.R. 424, 105th Cong. (as

Stat. 4789, 4829, and in 1994 to add "semiautomatic assault weapon" to the list of firearms implicating a ten-year mandatory sentence, *see* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110102, 108 Stat. 1796, 1998.

reported Oct. 24, 1997). It would have amended § 924(c)(1) to state as follows:

> A person who, during and in relation to any crime of violence or drug trafficking crime . . . for which the person may be prosecuted in a court of the United States –
>
> (A) possesses a firearm in furtherance of the crime, shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime, be sentenced to imprisonment for 10 years;
>
> (B) brandishes a firearm, shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime, be sentenced to imprisonment for 15 years; or
>
> (C) discharges a firearm, shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime, be sentenced to imprisonment for 20 years . . . .

Id. There is no doubt in this version of the statute that "in relation to" modifies all of the relevant verbs: possess (even though it is also modified by the phrase "in furtherance of the crime"), brandish, and discharge. H.R. Rep. No. 105-344, at 3, 11-12.

The Senate bill, in contrast, retained the "use or carry" language from the original statute but added new prohibitions on "possessing" and "discharging." In its original form, the Senate bill provided:

> [A]ny person who, during and in relation to any crime of violence or drug trafficking crime . . . for which a person may be prosecuted in a court of the United States, uses, carries, or possesses a firearm shall, in addition to the punishment

> provided for such crime of violence or drug trafficking crime –
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years . . . .

S. 191, 105th Cong. § 1 (as introduced Jan. 22, 1997). This version obviously did not include the "in furtherance of" language of the current statute. That phrase was added later, in order to conform more closely to the House version. See H.R. 424 (as reported Oct. 24, 1997). The amended Senate bill, as reported, provided:

> [A]ny person who, during and in relation to any crime of violence or drug trafficking crime . . . for which a person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime –
>
> (i) be sentenced to a term of imprisonment of not less than 5 years; and
>
> (ii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

S. 191 (as reported Nov. 6, 1997). Despite the different (and rather awkward) structure, there is no indication that legislators understood this language to differ in meaning from that in the House bill, including the definition and scope of "in relation to."

The two bills were passed in their respective houses, and referred to a conference committee. See

144 Cong. Rec. H10,329-30 (daily ed. Oct. 9, 1998) (statement of Rep. McCollum). That committee produced an amended bill that would become § 924(c)(1)(A). *Id.* It incorporated the structure and much of the language of the Senate proposal, but also included the "brandish" provision from the House bill. *Id.* The bill was subsequently approved by the House and Senate, and signed into law on November 13, 1998. *Remarks on Signing Legislation To Provide Educational Assistance to Families of Slain Officers and Strengthening Penalties for Criminals Using Guns*, 34 Weekly Comp. Pres. Doc. 2307 (Nov. 13, 1998).

3. Although the final bill did not adopt the precise structure of the House version, which most explicitly applied the "in relation to" modifier to the "brandish" and "discharge" provisions, it is clear that legislators anticipated that the bill would be interpreted in that manner. Notably, they characterized the Senate and House bills as "nearly identical" and as "companion" legislation. 144 Cong. Rec. H10,330 (daily ed. Oct. 9, 1998) (statement of Rep. McCollum); *id.* (statement of Rep. Myrick). The only difference mentioned during debates was the lesser penalties imposed under the Senate version: the House version prescribed a minimum sentence of ten years for possessing and twenty years for discharging a firearm, whereas the Senate bill provided for a sentence of five years for possessing and ten years for discharging. *Id.* (statement of Rep. Scott). There is no indication that legislators viewed the bills as incorporating different *mens rea* elements or restricting application of the "in relation to" modifier to only certain of the enumerated actions. See H.R. Rep. No. 105-344, at 12 ("The Committee intends to leave undisturbed the body of case law which has interpreted the phrase

'during and in relation to' in the context of prosecutions for violations of § 924(c).") (citing *Smith*).

It was clearly reasonable for Congress to expect that "in relation to" would apply to the "brandish" and "discharge" provisions. "Brandish" and "discharge" represent nothing more than particular ways in which a firearm may be "used" during a crime. See 144 Cong. Rec. H10,330 (daily ed. Oct. 9, 1998) (statement of Rep. McCollum). Legislators understood that this Court had defined "use" to require proof of intent and "active employment," *id.* (citing *Bailey*), and they did not attempt to change that definition through the amendment to § 924(c). Rather, they simply added a provision covering "possess[ion]" and then enumerated specific uses of a firearm that would be subject to higher penalties. *Id.* It follows that the same interpretation applied to "use," including the "in relation to" modifier, should also apply to "brandish" and "discharge."

The committee report confirms this conclusion. It states repeatedly that the "brandish" and "discharge" provisions will apply only if the defendant "brandishes or discharges a firearm *during and in relation to* the commission of a federal crime." H.R. Rep. No. 105-344, at 2 (emphasis added); see *id.* at 12 ("To sustain a conviction for brandishing or discharging a firearm, the government must demonstrate that the firearm was used 'during and in relation to' the commission of the federal crime of violence or drug trafficking crime.").[9] Statements

[9] *See also* H.R. Rep. No. 105-344, at 3 ("If a person brandishes a firearm, during and in relation to the commission of a crime, the additional prison term is fifteen years for a first offense. If the person discharges the firearm, during and in relation to the

during debates on the bill likewise assume that the "brandish" and "discharge" provisions will be modified by the phrase "in relation to." 144 Cong. Rec. H531 (daily ed. Feb. 24, 1998) (statement of Rep. McCollum) ("The bill . . . allows a penalty enhancement for 'possessing, brandishing, or discharging' a firearm during and in relation to a Federal crime of violence or drug trafficking crime."); 144 Cong. Rec. H10,330 (daily ed. Oct. 9, 1998) (statement of Rep. McCollum) (same).

The phrase "in furtherance of," which appears in the "possession" clause of § 924(c)(1)(A), was not intended to displace the "in relation to" modifier or limit its scope. The committee report explains that this language was inserted to ensure that mere knowing possession of a firearm during a crime would not result in the increased sentence; prosecutors would be required to prove not only that the gun was possessed "during and in relation to" the crime, but also that it was possessed "in furtherance of" the offense. H.R. Rep. No. 105-344, at 11 ("[The bill imposes] increased penalties [on] any person who 'possesses[,]' 'brandishes,' or 'discharges' a firearm during and in relation to the commission of a federal

commission of a crime, the additional prison term is twenty years for a first offense."); *id.* ("A person who brandishes a firearm, during and in relation to the commission of a crime, shall receive an additional term of imprisonment of at least twenty-five years. A person who discharges a firearm, during and in relation to the commission of a crime, shall receive an additional term of imprisonment of at least thirty years."); *id.* at 13 ("Under subsection (c)(1)(B), for brandishing during and in relation to the commission of the crime, a person shall receive, in addition to any other penalties, a minimum of fifteen years imprisonment. Under subsection (c)(1)(C), for discharging a firearm during and in relation to the commission of the crime, a person shall receive, in addition to any other penalties, a minimum of twenty years imprisonment.").

crime of violence or drug trafficking crime. Possession must *also* be 'in furtherance of the crime.'") (emphasis added). In other words, "in furtherance of" did not replace or change the "in relation to" standard, but merely added another evidentiary burden, requiring the prosecution to introduce additional "specific facts" showing that the firearm was possessed in order to advance the crime. *Id.* ("[T]he Committee believes that 'in furtherance of' is a slightly higher standard, *and encompasses* the 'during and in relation to' language.") (emphasis added); 144 Cong. Rec. S12,671 (daily ed. Oct. 16, 1998) (statement of Sen. DeWine) ("I believe that the 'in furtherance' language is a slightly higher standard that *encompasses* 'during and in relation to' language, by requiring an indication of helping forward, promote, or advance a crime.") (emphasis added).

* * *

Congress understood "in relation to" to incorporate a general intent requirement, and expected that requirement to apply to all of the prohibited acts in § 924(c)(1)(A), including the "brandish" and "discharge" provisions. As such, the increased penalties of subparagraphs (ii) and (iii) may be applied only when a person brandishes or discharges a firearm "knowingly."

II. THE PRESUMPTION OF *MENS REA* REQUIRES INCORPORATION OF A GENERAL INTENT ELEMENT IN § 924(C)(1)(A)(III).

The plain meaning of the statute is bolstered by the traditional presumption in favor of *mens rea*. See, *e.g.*, *X-Citement Video*, 513 U.S. at 70. That doctrine holds that a criminal statute will be construed to require proof of at least general intent "absent a clear

statement from Congress that *mens rea* is not required." *Staples*, 511 U.S. at 605-06, 618; see *Carter*, 530 U.S. at 267-69. No such statement exists in this case, and thus § 924(c)(1)(A)(iii) must be deemed applicable only when the firearm was discharged knowingly.

1. The presumption in favor of *mens rea* is strongly supported by a long and storied history. Edward Coke and William Blackstone, writing in the 17th and 18th Centuries, were expounding upon already-settled principles of law when they declared that the existence of "criminal intent" and a "vicious will" is the prerequisite of any crime. Edward Coke, *The Third Part of the Institutes of the Laws of England* 107 (William S. Hein Co. 1986) (1641) ("Actus non facit reum nisi mens sit rea [no act is criminal unless accompanied by a criminal intent]."); 4 William Blackstone, *Commentaries* *21 ("[A]n unwarrantable act without a vicious will is no crime at all."). This principle was soon imported into American law, leading courts to presume conscious wrongdoing as an element of any crime. *E.g.*, *Davis* v. *United States*, 160 U.S. 469, 484-85 (1895) (quoting Blackstone); see also *Morissette* v. *United States*, 342 U.S. 246, 251-52 (1952).

The presumption of *mens rea* is now so ingrained in our jurisprudence that, as this Court has recognized, it stands as one of the "background principle[s]" against which Congress legislates. *X-Citement Video*, 513 U.S. at 71; see also *Staples*, 511 U.S. at 605; *Liparota* v. *United States*, 471 U.S. 419, 426 (1985). It is assumed that Congress, in crafting legislation, recognizes that courts will read criminal provisions as incorporating a scienter requirement, even when the statute does not so provide in express terms. *E.g.*, *Liparota*, 471 U.S. at 426. Only in "limited

circumstances" – where Congress (i) has indicated clearly that no *mens rea* is required or (ii) obviously intended to create a "public welfare" or "regulatory" offense (generally imposing relatively minor penalties for possession or use of an inherently dangerous item) – will the Court dispense with a *mens rea* requirement altogether. *Staples*, 511 U.S. at 606-07 (quoting *United States* v. *U.S. Gypsum Co.*, 438 U.S. 422, 437 (1978)); see also *Morissette*, 342 U.S. at 258-63.

Against this "background principle," Congress undoubtedly anticipated that the presumption would apply to the Gun Control Act and its subsequent amendments. Nothing in § 924(c) or in the legislative record can be construed as a "statement from Congress that *mens rea* is not required." *Staples*, 511 U.S. at 605-06, 618. To the contrary, the congressional report accompanying the 1986 amendment specifically cites cases from this Court discussing the presumption of *mens rea*. H.R. Rep. No. 99-495, at 25-26 (citing *Bailey*, 444 U.S. 394). It further states that, with respect to the Gun Control Act, "[i]t is the Committee's intent . . . [that] the knowing state of mind shall apply to circumstances and results." *Id.*

Nor can § 924(c)(1)(A) or its subparts be described as a "public welfare" or "regulatory" offense. The statute does not seek to regulate the sale or dispensation of dangerous substances, or set standards of reasonable conduct for otherwise acceptable activities (such as speed limits for driving). See *Staples*, 511 U.S. at 607 (discussing characteristics of "public welfare" offense); *Morissette*, 342 U.S. at 258-63 (same); cf. *U.S. Gypsum*, 438 U.S. at 442 ("The criminal sanctions [in a public welfare offense] would be used, not to punish conscious and

calculated wrongdoing at odds with statutory proscriptions, but instead simply to *regulate* business practices regardless of the intent with which they were undertaken.") (emphasis in original). See generally Francis Bowes Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55 (1933). The penalties imposed under § 924(c)(1)(A) are also far out of line with the minor fines and short prison terms that typify "regulatory" and "public welfare" offenses. See *Staples*, 511 U.S. at 616-18 (stating that "public welfare offense[s] . . . [generally] provide[] for only light penalties such as fines or short jail sentences," and finding that a ten-year maximum term of imprisonment suggested "that Congress did not intend to eliminate a *mens rea* requirement"). Congress clearly intended § 924(c)(1)(A) to function as a traditional criminal statute, imposing punishment for specific wrongful behavior.

This conclusion is supported by the similarity of § 924(c)(1)(A) to the common law crime of assault. Presuming the existence of a *mens rea* element is, under this Court's decisions, particularly appropriate when the provision at issue bears resemblance to a common law crime for which intent was required.[10]

[10] This is not to suggest that a link to a common law crime is a prerequisite to application of the presumption of *mens rea*. *Carter*, 530 U.S. at 268 & n.6 ("This interpretive principle [the presumption of *mens rea*] exists quite apart from the canon on imputing common-law meaning.") (citing *X-Citement Video*, 513 U.S. at 70); *see* Sayre, *supra*, at 70 ("Clearly [application of the presumption] will not depend upon whether the crime happens to be a common law or statutory offense."), *cited in Staples*, 511 U.S. at 617. Nor is it to say that the elements of common law assault should themselves be incorporated into § 924(c)(1)(A). *See Carter*, 530 U.S. at 264-65 (refusing to assume that a statutory offense carried the same elements as a common law offense when the statute did not use common law terms of art).

See *Morissette*, 342 U.S. at 263; see also *United States* v. *Freed*, 401 U.S. 601, 607 (1971). The acts proscribed by subparagraphs (ii) and (iii) of § 924(c)(1)(A) involve threatening behavior that is likely to place others in fear for their physical safety. See 18 U.S.C. § 924(c)(4) (defining "brandish" to mean displaying a firearm "in order to intimidate [another] person"). This description closely matches the common law offense of criminal assault, which traditionally required proof that the defendant *intentionally* engaged in threatening conduct which put another person at fear for his or her safety. J.W. Cecil Turner, *Assault at Common Law*, 7 Cambridge L.J. 56, 57-58, 67 (1939); see also T.W. Hughes, *A Treatise on Criminal Law and Procedure* 165 (1919) (defining criminal assault, at common law, to require a "general criminal intent"); Wm. L. Clark & Wm. L. Marshall, *A Treatise on the Law of Crimes* 279 (1905) ("To render one guilty of criminal assault . . . a criminal intent . . . is necessary.").[11] In light of the relationship between § 924(c)(1)(A) and common law assault, it makes even more sense to presume that Congress anticipated that a general intent requirement would be read into the statutory provisions.

2. The government's counter-argument that the presumption of *mens rea* applies only to "elements" of

Rather, the similarity of the common law crime simply provides further proof that incorporation of a scienter element into § 924(c)(1)(A)(iii) is consistent with Congress's intent. *See X-Citement Video*, 513 U.S. at 71-72 (linking statute to "common-law offenses against the 'state, the person, property, or public morals'") (quoting *Morissette*, 342 U.S. at 255).

[11] These definitions follow a long line of English cases. *See generally* Turner, *supra* (citing, among others, *Tuberville* v. *Savage*, 86 Eng. Rep. 684 (K.B. 1699)).

an offense, and not to "sentencing enhancements,"[12] fails for a number of reasons. This Court has never intimated that the presumption of *mens rea* does not apply to "sentencing enhancements," or that its applicability depends on a provision's classification as an "element" of an offense. See, *e.g.*, *Liparota*, 471 U.S. at 427; *Morissette*, 342 U.S. at 273-75; see also *Brown*, 449 F.3d at 157 ("[A]lthough cases generally apply [the presumption of *mens rea*] to statutes that define criminal offenses, we have little doubt that it should also be applied to legal norms that define aggravating circumstances for purposes of sentencing.") (quoting *United States* v. *Burke*, 888 F.2d 862, 866 n.6 (D.C. Cir. 1989)). To the contrary, decisions in this area have apparently contemplated that the presumption would apply to *all* criminal provisions. See *Morissette*, 342 U.S. at 250-51 ("A relation between some mental element and *punishment* for a harmful act . . . has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution.") (emphasis added).

To deny application of the presumption of *mens rea* to sentencing enhancements would run counter to congressional expectations. Congress was aware of this Court's decisions on the presumption of *mens rea* when it enacted the brandish and discharge provisions of § 924(c)(1)(A), see *Albernaz* v. *United States*, 450 U.S. 333, 341 (1981) ("[I]t is appropriate for us 'to assume that our elected representatives . . . know the law.'") (quoting *Canon* v. *Univ. of Chi.*, 441

[12] In *Harris*, this Court classified the "brandish" and "discharge" provisions of § 924(c)(1)(A) as "sentencing factors" for purposes of the Fifth and Sixth Amendments. 536 U.S. at 556.

U.S. 677, 696-97 (1979)), and it reasonably anticipated that the presumption would apply to those provisions, see H.R. Rep. No. 99-495, at 25-26. Since the presumption of *mens rea* is an interpretive doctrine, it would defy common sense to use it in a manner that defeats Congress's expectations, by refusing to apply it to § 924(c)(1)(A)(iii).

Nor is this interpretation mandated by *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), or other decisions of this Court discussing when a statutory fact must be submitted to a jury and proved beyond a reasonable doubt. Those opinions explicitly eschew the distinction between "sentencing enhancements" and "elements" on which the government now relies as too formalistic, holding that the constitutional inquiry must be guided by the practical effect of the statutory fact, not its legislative classification. *Id.* at 476-78. They were, moreover, concerned with the *procedural* protections to be afforded to defendants under the Constitution. *Id.* In contrast, the presumption of scienter is concerned with the *substantive* interpretation of statutes. *Staples*, 511 U.S. at 606-07. Its applicability depends principally on the intentions of Congress, largely without regard to constitutionally mandated procedural restrictions. See *id.*

The presumption of *mens rea*, like the rule of lenity, arises principally not from constitutional doctrine but from the common law rule of strict constriction.[13]

[13] The absence of *mens rea* may, however, raise constitutional concerns in certain circumstances. *See Robinson* v. *California*, 370 U.S. 660, 666 (1962) (finding statute imposing penalty on persons addicted to narcotics, without proof of voluntary act, unconstitutional under Eighth Amendment); *see also U.S. Gypsum*, 438 U.S. at 437-38 ("While strict-liability offenses do not invariably offend constitutional requirements, the limited

Burke, 888 F.2d at 866 n.6; see *United States* v. *Lanier*, 520 U.S. 259, 266 (1996). That rule holds that *all* criminal provisions should be construed as narrowly as possible in accordance with congressional intent. *Lanier*, 520 U.S. at 266. It does not distinguish between "elements" and "enhancements." *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980). Indeed, this Court has specifically rejected arguments that the rule of lenity should be restricted to those aspects of a statute that define guilt or innocence. *Id.* ("[T]he Court has made it clear that this principle of statutory construction applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose."); see also *Liparota*, 471 U.S. at 427 (linking presumption of *mens rea* to rule of lenity); *U.S. Gypsum*, 438 U.S. at 437 (same). There is no basis, in light of those decisions, to limit the presumption of *mens rea* to "elements" of an offense, or to preclude its application during sentencing. See Jack B. Weinstein & Fred A. Bernstein, *The Denigration of Mens Rea in Sentencing*, 7 Fed. Sent'g Rep. 121, 121 (1994) ("It contorts the meaning of *mens rea* to say that state of mind is irrelevant to sentencing. It is at sentencing that *mens rea* is most crucial."); see also *Morissette*, 342 U.S. at 254 n.14 ("[N]o penal system that negates the mental element can find general acceptance."); Stephen J. Morse, *Inevitable Mens Rea*, 27 Harv. J.L. & Pub. Pol'y 51, 51-52 (2003) ("[M]ens rea . . . is crucial to culpability . . . .").

circumstances in which . . . this Court has recognized such offenses attests to their generally disfavored status.") (internal citations omitted); *cf.* Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 Sup. Ct. Rev. 107, 107 ("*Mens rea* is an important requirement, but it is not a constitutional requirement, except sometimes.").

3. The government also offers that the presumption of *mens rea* should not apply to sentencing enhancements – specifically the brandish and discharge provisions of § 924(c)(1)(A) – because individuals subject to those enhancements have already been found guilty of an underlying offense and there is thus no risk of criminalizing otherwise "innocent conduct." *Nava-Sotelo*, 354 F.3d at 1205, 1207. This argument misapprehends the nature of the presumption and the focus of the analysis.

This Court has often said that the presumption of *mens rea* is "particularly appropriate where . . . to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct." *Liparota*, 471 U.S. at 426; see *Carter*, 530 U.S. at 269; *Staples*, 511 U.S. at 610. But it has never said that the presumption applies *only* in this circumstance. Cf. *United States* v. *Santos*, 128 S. Ct. 2020, 2025 (2008) (plurality opinion) (applying rule of lenity when conduct at issue – operation of illegal lottery – was not itself innocent). The fact that a statute would impose penalties for otherwise innocent conduct if interpreted without an intent element has been viewed not as the *sine qua non* of the presumption of *mens rea*, but as another factor supporting incorporation of a scienter requirement.

The government's argument, moreover, incorrectly emphasizes the innocence of the *person*, rather than the innocence of the *conduct*. The focus of the analysis, in assessing whether a particular interpretation will lead to the criminalization of "innocent conduct," is necessarily on the "conduct" at issue: *i.e.*, the *actus reus* of the provision. See *X-Citement Video*, 513 U.S. at 71; *Staples*, 511 U.S. at 619. It is of no moment whether the particular defendant may be guilty of other offenses. The only

issue for these purposes is whether a strict liability construction of the provision might reach conduct that is not itself morally culpable, which Congress would likely not have intended to punish.

Phrased differently, the fact that a *person* is not "innocent" does not mean that specific aspects of his or her *conduct* are not so. An intent to do wrong cannot be extrapolated from one criminal act to all of the person's conduct without distending "*mens rea*" beyond any recognizable contours.

The statute at issue illustrates this point. An individual potentially subject to the discharge provision of § 924(c)(1)(A)(iii) must first be found guilty of a violent or drug trafficking crime, and for that reason cannot be deemed "innocent." But the particular *conduct* that gives rise to liability under subparagraph (iii) may itself be innocent. For example, an individual may, while committing a bank robbery, drop the firearm he or she is carrying at the direction of police. This is appropriate and "innocent" conduct in this circumstance – even if the gun discharges accidentally when it hits the floor. See *Brown*, 449 F.3d at 156-57. In this case, and in other hypotheticals that could be imagined, see *supra* pp. 11-12 (citing *Brown*),[14] interpreting § 924(c)(1)(A)(iii) as dispensing with an intent element would criminalize "innocent conduct."

[14] To the extent the government may argue that these situations should be ignored because they are unlikely to arise often, this Court has never held that unjustified punishment should be ignored merely because it will occur only infrequently. *Cf. Carter*, 530 U.S. at 268-69 (presuming statute prohibiting taking of money "by force and violence" to incorporate general intent requirement when statute might otherwise "apply to the hypothetical person who engages in forceful taking of money while sleepwalking (innocent, if aberrant activity)").

The government's rule, under which the presumption could never apply when persons subject to the statute are guilty of another offense, would also contradict settled interpretations of other statutes, including § 924(c)(1)(A). Under the government's reasoning, the presumption of *mens rea* would not apply to the "use or carry" provision of § 924(c)(1)(A) because persons subject to that provision have been found guilty of a violent or drug trafficking crime and are thus not "innocent." Yet, every court to consider the issue has held that the presumption applies and requires that provision to be read to incorporate a general intent element. *E.g.*, *Brown*, 449 F.3d at 156; *Nava-Sotelo*, 354 F.3d at 1205. The government has not argued otherwise, nor could it, since it concedes that "elements" of an offense – like the "use or carry" provision, see *Harris*, 536 U.S. at 556 – are subject to the presumption.

The only reasonable way to apply the presumption of *mens rea* is universally, to all criminal statutes. This is the result that Congress expected, that this Court's decisions suggest, and that the underlying doctrine of strict construction compels.[15]

[15] None of this is to say that a *mens rea* element applies to every sentencing enhancement. *Staples*, 511 U.S. at 606-07 (noting that the presumption does not apply to "regulatory" statutes or when Congress clearly intended to dispense with *mens rea*). Nor does it mean that, when the presumption applies, it will always require proof of knowledge of the *facts* relevant to the enhancement, for example the value of stolen property or quantity of drugs. Rather, in many cases (as this one), proof of knowledge as to the *actus reus* alone – *i.e.*, proof of intentional conduct – will suffice to "separate wrongful conduct from 'otherwise innocent conduct.'" *Carter*, 530 U.S. at 269.

* * *

The presumption of *mens rea* mandates that at least a general intent requirement be read into § 924(c)(1)(A)(iii). *Carter*, 530 U.S. at 268-69; see also *U.S. Gypsum*, 438 U.S. at 442. Knowledge as to the *actus reus* of the provision will ensure that the statute does not punish non-culpable behavior, and accords with the admonition that "a court [should] read into a statute only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter*, 530 U.S. at 269. This interpretation also instantiates the fundamental principle that a person who acts not volitionally, but only by accident or reflex, cannot be deemed morally blameworthy and should not be punished criminally for his or her conduct.[16]

III. THE RULE OF LENITY REQUIRES THAT § 924(C)(1)(A)(III) BE INTERPRETED TO INCLUDE A GENERAL INTENT ELEMENT.

The language and structure of the statute, its legislative history, and the presumption in favor of *mens rea* all require that § 924(c)(1)(A)(iii) be interpreted to incorporate a general intent element. However, even if the provision could yet be deemed ambiguous, the rule of lenity mandates that it be construed to require proof that the firearm was discharged knowingly.

[16] Justice Holmes perhaps put it best: "[E]ven a dog distinguishes between being stumbled over and being kicked." Oliver Wendell Holmes, Jr., *The Common Law* 3 (1881); *see also, e.g.*, Wayne R. LaFave & Austin W. Scott, Jr., *Criminal Law* § 3.2(c) (2d ed. 1986) ("[I]t is clear that criminal liability requires that the activity in question be voluntary."); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 Colum. L. Rev. 269, 338 (1996) ("It is axiomatic that criminal liability presupposes a 'voluntary act.'").

"The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *Santos*, 128 S. Ct. at 2025. It is based on the principles that a defendant should not be subject to punishment for conduct which is not clearly proscribed and that authority to extend criminal liability is vested not in the courts but in Congress. *Id.*; see *Ladner* v. *United States*, 358 U.S. 169, 177-78 (1958) ("We should not derive criminal outlawry from some ambiguous implication.") (quoting *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952)). When a criminal statute is reasonably subject to two interpretations, one which favors the defense and one which favors the prosecution, "the tie must go to the defendant." *Santos*, 128 S. Ct. at 2025; see *Bifulco*, 447 U.S. at 387 ("[T]his principle of statutory construction applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose."); *Ladner*, 358 U.S. at 178 (same).

The only textual argument that the government can make in support of its interpretation is that § 924(c)(1)(A)(iii) does not include an explicit "knowingly" modifier immediately antecedent to the phrase "is discharged." However, this argument overlooks the *mens rea* element inherent in the phrase "in relation to," which – as the text and legislative history make clear – Congress intended would apply to the discharge provision. H.R. Rep. No. 105-344, at 3, 12. It also ignores the presumption of *mens rea*, which requires a scienter element to be read into the provision even if not contained in the statute's express terms. *U.S. Gypsum*, 438 U.S. at 438 ("[F]ar more than the simple omission of the appropriate phrase from the statutory definition is

necessary to justify dispensing with an intent requirement."). Even if the government's construction could be viewed as reasonable, it is certainly not without doubt.

The rule of lenity therefore applies. *Bifulco*, 447 U.S. at 400 ("[T]o the extent that doubts remain, they must be resolved in accord with the rule of lenity."); see *United States* v. *Granderson*, 511 U.S. 39, 54 (1994) ("[W]here text, structure, and history fail to establish that the Government's position is unambiguously correct[,] we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor."). That doctrine compels that § 924(c)(1)(A)(iii) be interpreted to require proof that the discharge was volitional, and not merely accidental, unintentional, or involuntary.

* * *

The firearm discharge of which Christopher Michael Dean was found guilty was accidental. It therefore did not satisfy the *mens rea* requirement of § 924(c)(1)(A)(iii) and could not have triggered the ten-year mandatory term of imprisonment to which Mr. Dean was sentenced.

CONCLUSION

For these reasons, the Court should reverse the decision of the Court of Appeals for the Eleventh Circuit with instructions to vacate the judgment of the District Court and remand for resentencing.

Respectfully submitted,

JEFFREY T. GREEN
QUIN M. SORENSON
AMY L. HANKE
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

SCOTT J. FORSTER*
P.O. Box 102
Calhoun, GA 30703
(706) 625-1799

Counsel for Petitioner

* Counsel of Record

January 5, 2009

RESPONDENT'S BRIEF

Supreme Court, U.S.
FILED
FEB - 4 2009
OFFICE OF THE CLERK

No. 08-5274

In the Supreme Court of the United States

CHRISTOPHER MICHAEL DEAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

EDWIN S. KNEEDLER
Acting Solicitor General
Counsel of Record
RITA M. GLAVIN
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
DEANNE E. MAYNARD
Assistant to the Solicitor General
VIJAY SHANKER
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Section 924(c)(1)(A) of Title 18 of the United States Code criminalizes using or carrying a firearm during and in relation to a crime of violence or a drug trafficking crime, or possessing a firearm in furtherance of any such crime. The sentencing provision in Section 924(c)(1)(A)(iii) provides for a ten-year mandatory minimum sentence for a conviction of that offense "if the firearm is discharged." The question presented is whether the sentencing enhancement in Section 924(c)(1)(A)(iii) requires proof that the firearm was discharged intentionally or knowingly, rather than accidentally or involuntarily.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statutory provision involved 1
Statement 2
Summary of argument 6
Argument:
Section 924(c)(1)(A)(iii) provides for a sentencing enhancement without regard to whether the firearm was discharged knowingly or intentionally 10
A. The text, structure, purpose, and legislative history of Section 924(c)(1)(A)(iii) establish that the provision imposes no intent requirement 11
1. The text of Section 924(c)(1)(A) demonstrates that the "is discharged" sentencing factor contains no *mens rea* requirement 11
2. The structure of Section 924(c)(1) indicates that the "discharge" sentencing factor contains no intent requirement 18
3. The purpose of imposing a higher mandatory minimum when a firearm "is discharged" counsels against reading Section 924(c)(1)(A)(iii) as imposing a *mens rea* requirement 21
4. Congress's rejection of proposals that would have been more amenable to petitioner's construction indicates that it did not require an intent to discharge the firearm 24
5. Petitioner's construction is not necessary to avoid absurd results 29

Table of Contents—Continued: Page

B. No presumption requires reading a separate *mens rea* requirement into the sentencing factor at issue here and, in any event, any such presumption would be rebutted 31
1. Petitioner's argument is inconsistent with *Harris* 31
2. The bases for the common-law presumption in favor of *mens rea* are not present here 32
3. Any such presumption would be rebutted here ... 41
C. There is no reason to resort to the rule of lenity 42
Conclusion 44
Appendix 1a

TABLE OF AUTHORITIES

Cases:

Apprendi v. *New Jersey*, 530 U.S. 466 (2000) 41
Bailey v. *United States*, 516 U.S. 137 (1995) 26
Bifulco v. *United States*, 447 U.S. 381 (1980) 42, 43
Callanan v. *United States*, 364 U.S. 587 (1961) 42, 43
Carter v. *United States*, 530 U.S. 255 (2000) .. 32, 33, 34, 37
Castillo v. *United States*, 530 U.S. 120 (2000) 15, 29
Harris v. *United States*, 536 U.S. 545 (2002) ..... *passim*
INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987) 27
Liparota v. *United States*, 471 U.S. 419 (1985) 36
Morissette v. *United States*, 342 U.S. 246 (1952) 33, 34, 37
Muscarello v. *United States*, 524 U.S. 125 (1998) 43
Pinkerton v. *United States*, 238 U.S. 640 (1946) 20, 22
Russello v. *United States*, 464 U.S. 16 (1983) 19

Cases—Continued: Page

Smith v. *United States*, 508 U.S. 223 (1993) 3, 14, 42
Staples v. *United States*, 511 U.S. 600 (1994) 11, 31, 33, 36, 37, 38
United States v. *Arreola*, 467 F.3d 1153 (9th Cir. 2006), cert. denied, 127 S. Ct. 3002 (2007) 16
United States v. *Avery*, 295 F.3d 1158 (10th Cir.), cert. denied, 537 U.S. 1024 (2002) 18
United States v. *Balint*, 258 U.S. 250 (1922) 33, 34
United States v. *Brown*, 449 F.3d 154 (2006) 5, 20, 23, 24, 30
United States v. *Combs*, 369 F.3d 925 (6th Cir. 2004) 16
United States v. *Cotton*, 535 U.S. 625 (2002) 41
United States v. *Cross*, 900 F.2d 66 (6th Cir. 1990) 41
United States v. *Dahlman*, 13 F.3d 1391 (10th Cir. 1993), cert. denied, 511 U.S. 1045 (1994) 33
United States v. *DeLuna*, 10 F.3d 1529 (10th Cir. 1993) 41
United States v. *Dimas*, 3 F.3d 1015 (7th Cir. 1993) 41
United States v. *Feola*, 420 U.S. 671 (1975) 37, 41
United States v. *Fry*, 51 F.3d 543 (5th Cir. 1995) 35
United States v. *Gamboa*, 439 F.3d 796 (8th Cir.), cert. denied, 549 U.S. 1042 (2006) 35
United States v. *Gonzales*, 520 U.S. 1 (1997) 11, 12, 19, 24
United States v. *Guiterrez*, 978 F.2d 1463 (7th Cir. 1992) 34
United States v. *Holland*, 810 F.2d 1215 (D.C. Cir.), cert. denied, 481 U.S. 1057 (1987) 41
United States v. *Jackson*, 443 F.3d 293 (3d Cir. 2006) ... 41

Cases—Continued: Page

United States v. *King*, 345 F.3d 149 (2d Cir. 2003), cert. denied, 540 U.S. 1167 (2004) 35, 41
United States v. *Lavender*, 224 F.3d 939 (9th Cir. 2000), cert. denied, 531 U.S. 1098 (2001) 35
United States v. *Lewin*, 900 F.2d 145 (8th Cir. 1990) 41
United States v. *Mackey*, 265 F.3d 457 (6th Cir. 2001), cert. denied, 534 U.S. 1024 (2002) 18
United States v. *Matos-Quinones*, 456 F.3d 14 (1st Cir.), cert. denied, 549 U.S. 1088 (2006) 23
United States v. *Nava-Sotelo*, 354 F.3d 1202 (10th Cir. 2003), cert. denied, 541 U.S. 1035 (2004) 33
United States v. *Pitts*, 908 F.2d 458 (9th Cir. 1990) 41
United States v. *Ressam*, 128 S. Ct. 1858 (2008) 19
United States v. *Saavedra*, 523 F.3d 1287 (10th Cir. 2008) 35
United States v. *Santeramo*, 45 F.3d 622 (2d Cir. 1995) 33
United States v. *Thornton*, 306 F.3d 1355 (3d Cir. 2002) 35
United States v. *Williams*, 128 S. Ct. 1830 (2008) 27
United States v. *X-Citement Video, Inc.*, 513 U.S. 64 (1994) 15, 16, 33, 34, 37, 38
Watson v. *United States*, 128 S. Ct. 579 (2007) 12, 21

Statutes:

Act of Nov. 13, 1998, Pub. L. No. 105-386, 112 Stat. 3469:
§ 1(a)(1), 112 Stat. 3469 ..... 17, 19, 20, 25, 26
Hobbs Act, 18 U.S.C. 1951(a) 24

Statutes—Continued: Page

18 U.S.C. 924(c) ..... *passim*
18 U.S.C. 924(c)(1) 16, 18
18 U.S.C. 924(c)(1)(A) ..... *passim*
18 U.S.C. 924(c)(2) 2, 4
18 U.S.C. 924(c)(4) 2, 3, 19, 21
21 U.S.C. 841(a) 40
21 U.S.C. 841(a)(1) 40
21 U.S.C. 841(b)(1)(A) 41
21 U.S.C. 841(b)(1)(C) 41
21 U.S.C. 860 41
21 U.S.C. 860(a) 40

Miscellaneous:

American Heritage Book of English Usage (1996) 13
The Chicago Manual of Style (15th ed. 2003) 15
4 William Blackstone, *Commentaries* 39
136 Cong. Rec. 16,225 (1990) 25
141 Cong. Rec. 11,085 (1995) 25
144 Cong. Rec. 25,036 (1998) 28
H.R. 424, 105th Cong., 1st Sess. (1997) 26
H.R. 424, 105th Cong., 2d Sess. (1998) 26
H.R. 1488, 104th Cong., 1st Sess. (1995) 25
H.R. Rep. No. 344, 105th Cong., 1st Sess. (1997) 26, 27, 28
Wayne R. LaFave, *Substantive Criminal Law*:
Vol. 1 32
Vol. 2 32

Miscellaneous—Continued: Page

S. 191, 105th Cong., 2d Sess. (1997) 27
S. 1241, 102d Cong., 1st Sess. (1991) 25
Violent and Drug Trafficking Crimes: The Bailey Decision's Effect on Prosecutions Under 924(c): Hearings Before the Comm. on the Judiciary United States Senate, 104th Cong., 2d Sess (1996) ... 22

In the Supreme Court of the United States

No. 08-5274

CHRISTOPHER MICHAEL DEAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.A. 133-147) is reported at 517 F.3d 1224.

JURISDICTION

The judgment of the court of appeals (J.A. 148) was entered on February 20, 2008. A petition for rehearing was denied on April 15, 2008 (J.A. 149). The petition for a writ of certiorari was filed on July 11, 2008, and was granted on November 14, 2008. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 924(c) of Title 18 is reprinted in an appendix to this brief. App., *infra*, 1a-4a.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted of conspiring to interfere with interstate commerce by robbery, in violation of the Hobbs Act, 18 U.S.C. 1951(a), and using a firearm during and in relation to that robbery, a violent felony, in violation of 18 U.S.C. 924(c)(1)(A) and 2. Petitioner was sentenced to 220 months of imprisonment, to be followed by five years of supervised release. The court of appeals affirmed. J.A. 133-147.

1. Section 924(c)(1)(A) of Title 18 of the United States Code provides in relevant part:

> [A]ny person who, during and in relation to any crime of violence or drug trafficking crime * * * for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. 924(c)(1)(A).

Section 924(c)(4) defines "brandish" for purposes of this subsection to mean "to display all or part of the firearm, or otherwise make the presence of the firearm

known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person." 18 U.S.C. 924(c)(4). Section 924(c) does not define the term "discharged."

2. On November 10, 2004, a masked man carrying a pistol entered the Rome, Georgia, branch of the AmSouth Bank, waved the gun, and ordered everyone in the bank to the ground. The robber entered the tellers' area. There, he began removing cash from the drawers with one hand, while continuing to hold the pistol in his other hand. At one point, the robber reached over a teller, who was on her knees below her teller station, to remove cash from a teller drawer. J.A. 15-18. While he was removing the cash, he "pulled the trigger," discharging the firearm. J.A. 79. The robber cursed when the gun fired. J.A. 19.

The teller under the desk testified that, when the gun fired, it was close to her face. J.A. 29. The bank manager testified that, when the gun went off, "it shook us all because we couldn't see [the teller's] head," as she was below the teller station. One of the bank employees "in the lobby popped up and said, 'oh, my God, has he shot [her]?,'" and the manager told her to "just get down because, again, it was a loud pop, and we couldn't see [the teller]." J.A. 22. The bullet struck a partition between two tellers' work stations, leaving a hole. The robber took the cash and fled the bank and entered a vehicle waiting outside for his escape. J.A. 15-29, 47-48, 54-55, 79.

A short while later, the police located the get-away vehicle in the parking lot of an apartment complex. The police also observed petitioner approach the vehicle and look into the driver's window. The police questioned petitioner and arrested him. J.A. 31-35, 57-60.

Petitioner gave the officers his address in an adjacent apartment complex. An officer went to the apartment and saw Ricardo Curtis Lopez inside. The officer also observed a pile of money on top of a television, some of which was still wrapped in a bank band. Officers entered the apartment and arrested Lopez, whom they found hiding in a bedroom. A search of the apartment uncovered the pistol that had been used in the robbery, a spent shell casing, cash, and keys and other materials from the car dealership from which the get-away vehicle had been stolen. J.A. 35-46, 53-54.

Before trial, petitioner and Lopez each confessed to the robbery. Each, however, claimed sole responsibility for the robbery and denied any involvement by the other. J.A. 62-63, 75-76.

3. A federal grand jury returned a two-count indictment charging petitioner and Lopez with conspiring to interfere with interstate commerce by robbery, in violation of the Hobbs Act, 18 U.S.C. 1951(a) (Count 1), and using a firearm in the commission of that robbery, in violation of 18 U.S.C. 924(c)(1)(A) and 2 (Count 2). The indictment alleged that the firearm was discharged during the commission of the offense charged in Count 2. J.A. 11-12.

At trial, petitioner admitted to robbing the bank and stated that he did so alone. Petitioner testified that when he was removing money from the teller station, he "pulled the trigger" on the pistol he was carrying while trying to transfer the gun from one hand to the other. He then cursed and left the bank. J.A. 77-81. The jury found petitioner guilty on both counts. J.A. 82.

At sentencing, the probation office recommended that the court find that petitioner was subject to a ten-year mandatory minimum sentence on Count 2 under 18

U.S.C. 924(c)(1)(A)(iii), because the firearm was discharged during the robbery. J.A. 164. Petitioner objected, claiming that the evidence showed that the gun had discharged accidentally and that Section 924(c)(1)(A)(iii) does not apply to accidental discharges. See, *e.g.*, J.A. 94-95, 97, 122.

The district court overruled petitioner's objection, holding that Section 924(c)(1)(A)(iii) applies when a firearm is discharged accidentally. J.A. 103. Consistent with that ruling, the court sentenced petitioner to a 100-month sentence on Count 1 and a consecutive ten-year mandatory minimum sentence on Count 2, for a total sentence of 220 months of imprisonment. J.A. 118-119, 126.

4. The court of appeals affirmed. J.A. 133-147. The court first stated that the "[t]estimony at trial supports [petitioner's] assertion that the discharge of the firearm inside the bank was a surprise even to [petitioner] and, thus, was likely accidental." J.A. 139. The court held, however, that Section 924(c)(1)(A)(iii) does not require proof that petitioner intended to discharge the firearm. J.A. 139-142. The court of appeals reasoned that the text of Section 924(c)(1)(A)(iii) does not impose an intent requirement and that, because Clause (iii) defines a sentencing enhancement rather than a criminal offense, the general presumption in favor of *mens rea* does not apply. J.A. 139-141.

The court disagreed with the D.C. Circuit's analysis in *United States* v. *Brown*, 449 F.3d 154 (2006). J.A. 141-142. The court explained that, contrary to the reasoning of the D.C. Circuit, the increased mandatory minimum sentences in Section 924(c)(1)(A) do not reflect solely a defendant's increasingly culpable intent, but also reflect the fact that "discharging a firearm, regard-

less of intent, presents a greater risk of harm than simply brandishing a weapon without discharging it." J.A. 142. The court also rejected the D.C. Circuit's reliance on the "general presumption against strict liability in criminal statutes," in light of the "distinction between elements of an offense and sentencing enhancements." *Ibid.*[1]

SUMMARY OF ARGUMENT

A. 1. Section 924(c)(1)(A) of Title 18 prohibits using or carrying a firearm during and in relation to any crime of violence or drug trafficking crime and possessing a firearm in furtherance of any such crime. The maximum sentence for any violation of Section 924(c)(1)(A) is life imprisonment. In three clauses in separate paragraphs, the statute sets the applicable mandatory minimum sentences, depending on the manner in which the Section 924(c)(1)(A) crime was committed—five years for any violation; seven years if the firearm was brandished; and ten years if the firearm was discharged. 18 U.S.C. 924(c)(1)(A)(i)-(iii). This Court has held that the opening paragraph of Section 924(c)(1)(A) "list[s] the elements of a complete crime," while Clauses (i), (ii), and (iii) set out "paradigmatic sentencing factors," rather than separate offenses. *Harris* v. *United States*, 536 U.S. 545, 553 (2002).

The government need not prove that a defendant knowingly or intentionally discharged the firearm in

---

[1] In addition, the court affirmed Lopez's conviction on both counts, as well as his sentence of 198 months of imprisonment, which included a 78-month sentence on Count 1 and a consecutive ten-year sentence on Count 2. Lopez filed a petition for a writ of certiorari (No. 08-298) presenting the question at issue here, and that petition for a writ of certiorari remains pending.

order to trigger the ten-year mandatory minimum under Section 924(c)(1)(A)(iii). The plain text of the statute imposes no requirement that the firearm be discharged knowingly or intentionally. Rather, Clause (iii) calls for a ten-year mandatory minimum if a "certain fact[] [is] present," *Harris*, 536 U.S. at 553, namely, if "the firearm is discharged," 18 U.S.C. 924(c)(1)(A)(iii). Congress spoke in the passive voice and did not specify who or what must cause the discharge.

The phrase "in relation to" in the principal paragraph of Section 924(c)(1)(A) does not modify the separate sentencing factors. Those factors are not part of the *actus reus* of the offense, are structurally separated into different subsections, and are separated from that adverbial phrase by an independent clause with its own adverbial phrase.

2. The structure of the tiered mandatory minimum sentences of Section 924(c)(1)(A) supports the conclusion that Clause (iii) does not include a separate *mens rea* requirement. None of the clauses themselves contains an express *mens rea* requirement. Congress did provide for an intent requirement with respect to the brandishing enhancement, but it did so in a separate provision defining that term. Thus, where Congress wanted to impose a *mens rea* requirement, it did so explicitly, and its decision not to do the same as to Clause (iii) must be given effect.

3. The purpose of the "discharge" sentencing enhancement further supports the lack of an intent requirement. Sentencing routinely takes into account not only an offender's relative moral culpability but also the risk of harm. The sentencing enhancements in Section 924(c)(1)(A)(ii) and (iii) reflect those dual considerations. The enhancement when the firearm is discharged, for

instance, reflects a judgment by Congress not only of heightened moral culpability, but also the greatly increased risks that are inevitably associated with discharge of a gun in a violent or drug trafficking crime: that death or injury will result, that violence will be used to respond to the offender, and that victims will be terrorized to an even greater extent. Those foreseeable harms result whether or not the discharge is intentional.

4. The legislative history of Section 924(c)(1)(A) demonstrates that Congress purposely omitted a *mens rea* requirement from the discharge sentencing enhancement. Congress did not adopt proposals in the House of Representatives that would have expressly qualified the discharge sentencing factor by "in relation to," or that would have contained active language and a structure indicating that "discharge" was part of the *actus reus* of the offense. The enacted text instead reflects the different language of the Senate bill, setting the "discharge" factor out as a separate sentencing enhancement and using the passive "is discharged" language.

5. It is not necessary to read the words "in relation to" in the offense-creating paragraph as modifying "is discharged" in the sentencing provision in order to avoid the assertedly "absurd results" posited by petitioner. Because sentencing enhancements are applied only to the complete crime of conviction, and reflect the manner in which that crime was committed, the discharge enhancement applies only to that subset of Section 924(c)(1)(A) violations involving a discharge. And it is entirely reasonable for Congress to subject to an enhanced sentence an offender who is careless enough with a loaded firearm he uses during and in relation to a

crime of violence or drug trafficking crime that the firearm "is discharged," even accidentally.

B. 1. The common law presumption of *mens rea* in criminal statutes does not justify reading a *mens rea* requirement into the Section 924(c)(1)(A) sentencing factors. That presumption does not extend to sentencing factors. Congress is presumed to incorporate into crimes the background rule of the common law requiring some *mens rea* for an offense. But the common law has never required separate *mens rea* for facts on which a judge relies to increase the sentence within the statutory maximum.

2. The overriding purpose of the common law presumption in favor of *mens rea* is the need to separate wrongful conduct from otherwise innocent conduct. But there is no such need here: the discharge enhancement applies only when an offender uses a firearm during the commission of a crime of violence or a drug trafficking crime. In that circumstance, the commission of both the underlying violent or drug offense and the firearm offense in Section 924(c)(1)(A) establishes the offender's requisite vicious will. Moreover, no potential "innocent conduct" is associated with using a firearm to commit such a violent felony or drug trafficking crime.

3. In any event, even assuming the presumption of *mens rea* applies to the sentencing factors at issue here, the presumption is easily rebutted by the indications that Congress purposely omitted a *mens rea* requirement. Specifically, Congress omitted a *mens rea* requirement in the "discharge" provision while including one in the "brandish" provision; spoke in the passive voice; and rejected a House amendment to the statute that would have been more amenable to the reading that "discharge" was part of the *actus reus* of the offense.

C. The rule of lenity has no application here because Section 924(c)(1)(A)(iii) is unambiguous. By its terms, it imposes no requirement that the firearm was discharged knowingly or intentionally, and that interpretation is supported by the statute's structure, purpose, and legislative history. Nor can the presumption of *mens rea* in criminal statutes—even assuming it applies to sentencing factors—be used to create an ambiguity in the statute when none otherwise exists.

ARGUMENT

SECTION 924(c)(1)(A)(iii) PROVIDES FOR A SENTENCING ENHANCEMENT WITHOUT REGARD TO WHETHER THE FIREARM WAS DISCHARGED KNOWINGLY OR INTENTIONALLY

The court of appeals correctly held that no separate *mens rea* must be shown to support an enhanced minimum sentence under Section 924(c)(1)(A)(iii) for "discharge[]" of a firearm. When a firearm is discharged in an offense under Section 924(c)(1)(A), the statutory enhancement applies. No presumption of a *mens rea* requirement applies to "paradigmatic sentencing factors," *Harris* v. *United States*, 536 U.S. 545, 553 (2002), such as the one at issue here. And clear indications from the text, structure, purpose, and history of the statute demonstrate that courts should not override the statutory language and insert an intent requirement that Congress did not provide.

A. The Text, Structure, Purpose, And Legislative History Of Section 924(c)(1)(A)(iii) Establish That The Provision Imposes No Intent Requirement

1. The text of Section 924(c)(1)(A) demonstrates that the "is discharged" sentencing factor contains no mens rea requirement

a. Whether Section 924(c)(1)(A)(iii) includes a separate *mens rea* requirement "is a question of statutory construction." *Staples* v. *United States*, 511 U.S. 600, 604 (1994). As such, the starting point for interpreting the provision—and the ending point if the language is clear—is its plain language. See *United States* v. *Gonzales*, 520 U.S. 1, 4-6 (1997) (applying this principle to a prior version of Section 924(c)). Here, the language is clear, and it imposes no requirement that the firearm be discharged knowingly or intentionally.

As this Court has held, the "principal paragraph" of Section 924(c)(1)(A) "list[s] the elements of a complete crime." *Harris*, 536 U.S. at 552. That paragraph provides that "any person who, during and in relation to any crime of violence or drug trafficking crime * * * uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm," has committed a criminal offense. 18 U.S.C. 924(c)(1)(A). After setting forth the elements of that "single offense," *Harris*, 536 U.S. at 556, the statute contains three clauses that govern how defendants are to be sentenced. As this Court has explained, Clause (i) "sets a catchall minimum" sentence of five years, up to the statutory maximum of life imprisonment, for any commission of the offense. *Id.* at 552-553. Clauses (ii) and (iii), "in turn, increase the minimum penalty if certain facts are present," *id.* at 553, namely, if the firearm "is brandished" or "is discharged,"

18 U.S.C. 924(c)(1)(A)(ii) and (iii). Those clauses do not define separate offenses, but instead set out "paradigmatic sentencing factors." *Harris*, 536 U.S. at 552. As such, those factors "need not be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt." *Id.* at 568.

The text of Clause (iii), the "discharge" sentencing factor, contains no separate *mens rea* requirement. 18 U.S.C. 924(c)(1)(A)(iii). It provides simply that anyone who violates Section 924(c)(1)(A) shall, "*if the firearm is discharged*, be sentenced to a term of imprisonment of not less than 10 years." *Ibid.* (emphasis added). Congress included no words of qualification or limitation. For example, Congress could have, but did not, make the ten-year mandatory minimum sentence applicable only if the defendant discharged the firearm knowingly, intentionally, or with an intent to injure, assault, or intimidate. Accordingly, "[t]here is no basis in the text for limiting [Section] 924(c)" to certain types of discharges. *Gonzales*, 520 U.S. at 3, 5 (finding that a sentence under Section 924(c) must run consecutively to any other sentence, including state sentences, and vacating the court of appeals' approach, which had rejected a "literal reading" of Section 924(c)).

Congress's use of the passive voice—"if the firearm is discharged"—further supports that conclusion. It reflects an "agnosticism" on the part of Clause (iii) as to who (or what) discharged the firearm or why. See *Watson* v. *United States*, 128 S. Ct. 579, 584 (2007). That formulation contrasts with Congress's use of the active voice in the principal paragraph setting forth the offense, which signifies that the "perpetrator must be clearly identifiable in advance." See *ibid.*

Petitioner observes (Br. 14 n.6) that "discharge" is used in its transitive form, such that it "require[s] a subject to act upon an object." But that is true regardless of whether the transitive verb is used in the active or passive voice, see *American Heritage Book of English Usage* 45-47 (1996), and it does not follow that the act must be intentional. For example, the verbs in the sentences "I lost my wallet" or "The drink was spilled by Joe" are transitive, but they nevertheless connote accidental conduct. Petitioner suggests (Br. 15 n.6) that Congress could have required an enhancement when the "firearm discharges" if it had wanted to cover accidental discharges. But the distinction between petitioner's hypothetical language and the statutory language is not one of accidental versus intentional, but simply that the statutory language "is discharged" requires someone (or something) to cause the discharge, whether accidentally or otherwise.

b. Petitioner does not contend that Clause (iii) by its terms contains a *mens rea* requirement. Instead he contends, for the first time in this Court, that the phrase "in relation to" in the principal paragraph of Section 924(c)(1)(A) embodies a *mens rea* requirement and modifies the verb "discharge[]" in Clause (iii). See Pet. Br. 7-15; cf. Pet. C.A. Br. 12-16. Even assuming that the "in relation to" phrase embodies some type of *mens rea* requirement, see note 9, *infra*, that phrase does not travel down to modify "is discharged" in the sentencing-enhancement provision, and no court has held that it does.

In *Smith* v. *United States*, 508 U.S. 223 (1993), this Court concluded that, to satisfy the "in relation to" element in the offense of using or carrying a firearm during and in relation to a crime of violence or drug trafficking crime, the firearm "must have some purpose or effect

with respect to the drug trafficking [or violent] crime; its presence or involvement cannot be the result of accident or coincidence." *Id.* at 238. Petitioner seeks to apply that qualification to the "is discharged" sentencing factor in Clause (iii). He bases that argument on the premise that, because "in relation to" is an "adverbial phrase * * * appear[ing] before a series of verbs that constitute the *actus reus* of the provisions, including 'use,' 'carry,' 'possess,' 'brandish,' and 'discharge,'" the phrase "must therefore be construed to apply to all of these acts." Pet. Br. 10. That is incorrect.

As an initial matter, that argument cannot be reconciled with this Court's threshold statutory holding in *Harris* that the opening paragraph of Section 924(c)(1)(A) "list[s] the elements of a complete crime," *Harris*, 536 U.S. at 552, while Clauses (i), (ii), and (iii) are "sentencing factors to be found by the judge, not offense elements to be found by the jury," *id.* at 556. Under that decision, if a defendant uses or carries a firearm during a drug trafficking or violent crime, and the use or carrying of the firearm has "some purpose or effect with respect to" that underlying crime and is not "the result of accident or coincidence," *Smith*, 508 U.S. at 238, the offense is complete. The language in Clause (iii) does not describe an element of the offense and it is not the *actus reus* of the offense. Because petitioner's textual argument (Br. 10) hinges on the premise that the verb "discharge[]" "*constitute[s]* the *actus reus*," *ibid.* (emphasis added), that argument fails.[2]

---

[2] The only mention in petitioner's brief of *Harris*'s statutory holding is in a footnote in which he describes the Court as having "classified the 'brandish' and 'discharge' provisions of [Section] 924(c)(1)(A) as 'sentencing factors' for purposes of the Fifth and Sixth Amendments." Pet. Br. 30 n.12. To the extent petitioner suggests that the Court's holding

The same textual and structural aspects of the statute that informed the Court's holding in *Harris* confirm that the phrase "in relation to" does not modify the sentencing factor of "discharge." The "in relation to" phrase is part of the "lengthy principal paragraph," while the clause containing the discharge sentencing factor is contained in a "separate subsection[]." *Harris*, 536 U.S. at 552 (citing *Castillo* v. *United States*, 530 U.S. 120, 124 (2000)). The most natural grammatical reading of the statute is that the adverbial phrase "in relation to" modifies only the two verbs—"uses or carries"—that are placed together immediately following the adverbial phrase. See *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 68 (1994) ("The most natural grammatical reading * * * suggests that the term 'knowingly' modifies only the surrounding verbs."); *The Chicago Manual of Style* para. 5.167, at 188 (15th ed. 2003) ("A prepositional phrase with an adverbial or adjectival function should be as close as possible to the word it modifies to avoid awkwardness, ambiguity, or unintended meanings.").

That conclusion is reinforced by several additional textual and structural clues. The phrase "in relation to" is not "antecedent to a series of verbs" in the manner that petitioner suggests. See Pet. Br. 10 (listing "'use,' 'carry,' 'possess,' 'brandish,' and 'discharge'"). The statute does not contain a list of verbs, or even a series of similar verbs; rather, the verbs are in different voices. In the principal paragraph, the verbs are in the active

---

in that regard can somehow be cabined as a constitutional holding, that is not correct. As the Court explained, before reaching the constitutional question, it "answer[ed] a threshold question of statutory construction: Did Congress make brandishing an element or a sentencing factor in [Section] 924(c)(1)(A)?" *Harris*, 536 U.S. at 552.

voice—"uses or carries" and "possesses"; in the sentencing clauses, the statute shifts to the passive voice—"is brandished" and "is discharged." Cf. *X-Citement Video*, 513 U.S. at 68 (involving a statute containing a series of verbs that were all in the active voice: "transports, ships, receives, distributes, or reproduces"). Moreover, the verb "possesses" is contained in a separate clause, which is set off by commas and introduced by its own relative pronoun: ", or who, in furtherance of any such crime, possesses a firearm,". 18 U.S.C. 924(c)(1)(A). That intervening clause sets forth an alternative means —other than the use or carrying of a firearm "during and in relation to" an underlying crime—by which a defendant can violate Section 924(c)(1)(A). The fact that "possesses" is modified by its own, different adverbial phrase—"in furtherance of"—provides additional support for the conclusion that "in relation to" does not travel past "uses or carries," much less modify the verbs that are set forth in the separate sentencing clauses in Sections 924(c)(1)(A)(ii) and (iii).[3]

---

[3] See *United States* v. *Arreola*, 467 F.3d 1153, 1155 (9th Cir. 2006) (holding that the "possesses" and "uses or carries" phrases in Section 924(c)(1)(A) define "two means of committing a single offense"), cert. denied, 127 S. Ct. 3002 (2007). As petitioner notes (Br. 11), the Sixth Circuit has construed Section 924(c)(1)'s "uses or carries" and "possesses" prongs as creating two separate crimes. See *United States* v. *Combs*, 369 F.3d 925, 930-933 (2004). The Sixth Circuit reasoned that those prongs are contained in separate clauses and that the two prongs establish different substantive standards. *Ibid.* Whatever may be the ultimate resolution of that debate, the significant point for present purposes is that under either court's reading, the "in relation to" phrase does not modify the verb "possesses." See *Arreola*, 467 F.3d at 1157 ("As a matter of grammatical construction, the use of the disjunctive indicates that Congress was addressing two separate acts."); *Combs*, 369 F.3d at 931 ("The two prongs of the statute are separated by the dis-

Contrary to petitioner's suggestion (Br. 10 & n.3), the effect of the "interrupt[ion]" caused by that "separate modifying clause" cannot be explained as an accident of statutory history. As petitioner acknowledges elsewhere (Br. 19), the "possession" prong was added by the same amendment that added the "discharge" sentencing factor. See Act of Nov. 13, 1998, Pub. L. No. 105-386, § 1(a)(1), 112 Stat. 3469 (P.L. 386). If Congress had intended petitioner's meaning, it would have amended the statute to make "in relation to" expressly modify the verb "discharge," as some of the rejected legislative proposals might have done. See pp. 25-28, *infra*.

Equally significant, the sentencing factors in Clauses (ii) and (iii) apply to defendants who violate Section 924(c)(1)(A) by using or carrying a firearm during and in relation to a crime of violence or drug trafficking crime, *as well as* to those who violate it by possessing a firearm in furtherance of any such crime. It thus would make little sense to read the "in relation to" phrase in the principal paragraph as modifying the "is brandished" or "is discharged" verbs in those generally applicable sentencing factors.

Petitioner offers two possible responses to this anomaly, neither of which warrants departing from the most grammatical reading of the text. First, petitioner suggests that it "makes sense" to apply "in relation to" to the sentencing factors because "'brandish' and 'discharge' represent ways in which a firearm is 'used,' beyond mere possession." Pet. Br. 11. But the possession prong requires more than "mere possession," and a defendant who violates that prong by possessing a firearm

---

junctive 'or,' which, according to the precepts of statutory construction, suggests the separate prongs must have different meanings.").

in furtherance of a crime of violence or drug trafficking crime could brandish or discharge in so possessing it. In the alternative, petitioner suggests that "in furtherance of," "instead of 'in relation to,'" could be "deemed to modify 'brandish' and discharge.'" *Id.* at 11 n.4. That makes no more sense than deeming them modified by "in relation to"—either way, the Court would be choosing one adverbial phrase over another, when the most grammatical reading of the statute is that neither of those offense elements modifies the verbs in the sentencing factors.[4]

2. The structure of Section 924(c)(1) indicates that the "discharge" sentencing factor contains no intent requirement

The structure of Section 924(c)(1) further supports the conclusion that the "discharge" sentencing factor contains no *mens rea* requirement. The brandishing enhancement in Clause (ii) is phrased similarly to the discharging enhancement in Clause (iii). Compare 18 U.S.C. 924(c)(1)(A)(ii) ("if the firearm is brandished"), with 18 U.S.C. 924(c)(1)(A)(iii) ("if the firearm is discharged"). By their terms, neither clause includes a

---

[4] Although petitioner contends that "in relation to" and "in furtherance of" "carry substantially the same meaning," Pet. Br. 11 n.4, courts of appeals have differentiated them. See, *e.g.*, *United States* v. *Avery*, 295 F.3d 1158, 1174 (10th Cir. 2002) ("the terms 'in furtherance of' and 'in relation to' are not entirely interchangeable"), cert. denied, 537 U.S. 1024 (2002); *United States* v. *Mackey*, 265 F.3d 457, 461 (6th Cir. 2001) (observing that "Congress intended the 'in furtherance of' limitation to be a higher standard than 'during and in relation to,' which continues to modify the use and carry prongs of the statute"), cert. denied, 534 U.S. 1024 (2002); see also H.R. Rep. No. 344, 105th Cong., 1st Sess. 11 (1997) ("[T]he Committee believes that 'in furtherance of' is a slightly higher standard.").

mens rea requirement. Rather, with respect to brandishing, Congress expressly included a *mens rea* requirement in a *separate* provision. Section 924(c)(4) provides that "brandish" means "to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, *in order to intimidate* that person, regardless of whether the firearm is directly visible to that person." 18 U.S.C. 924(c)(4) (emphasis added). Although Congress enacted Clauses (ii) and (iii) as part of the same legislation, Congress provided no similar purpose-based definition of "discharge." See P.L. 386, § 1(a)(1), 112 Stat. at 3469-3470.

That silence is "significant." See *Gonzales*, 520 U.S. at 5 (finding it corroborative of the plain meaning of Section 924(c) that Congress expressly limited or restricted the meaning of one phrase in Section 924(c) but included no such limitation or restriction of another phrase in the same statute). When Congress wanted to impose a *mens rea* requirement, it did so explicitly, and its decision not to do so with respect to Clause (iii) must be given effect. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (brackets in original); see also *United States* v. *Ressam*, 128 S. Ct. 1858, 1862 (2008) ("Even if the similarity of the original texts of the two statutes might have supported an inference that both included an implicit relationship requirement, their current difference virtually commands the opposite inference.").

Petitioner endorses (Br. 13 n.5) the D.C. Circuit's suggestion that that principle does not apply here because, "[h]aving embarked on a definition [of 'brandish']

the drafter thought it proper to specify the required intent." *United States* v. *Brown*, 449 F.3d 154, 157 (2006). Particularly given that the definition and Clauses (ii) and (iii) were all enacted in the same legislation, see P.L. 386, § 1(a)(1), 112 Stat. at 3469-3470, that reasoning does not explain why Congress specified no intent for "discharge." Petitioner contends that "the fact that Congress defined the *particular* intent necessary to constitute 'brandishing,' without even mentioning the requisite *general* intent, strongly implies that Congress understood that a general intent element had already been incorporated into subparagraphs (ii) and (iii)." Pet. Br. 14 n.5. But that assumes the answer to the question at issue: whether sentencing factors should be presumed to have a general-intent requirement despite the absence of one in the text.[5]

Nor can petitioner draw support from Clause (i), which provides the mandatory minimum for any violation of Section 924(c)(1)(A). Petitioner contends that because the mandatory minimum sentences in Clauses (i) and (ii) apply "only if the proscribed conduct was performed knowingly," Pet. Br. 12, it follows that Clause (iii) must also contain such a requirement. But Clause (i) merely "sets a catchall minimum" for the crime. *Harris*, 536 U.S. at 552-553. By its terms, it requires no *mens rea* (or even any fact) beyond the commission of the offense. And, as explained, Clause (ii)'s *mens rea* re-

---

[5] Indeed, even with respect to "brandish," the sentencing enhancement—which is phrased in the passive voice—does not require that the intent to intimidate be the *defendant's* intent; it simply requires that the firearm that is the subject of the defendant's conviction have been brandished, as defined, by someone. Of course, *Pinkerton* principles would also subject a defendant to the enhanced sentence for a confederate's brandishing. See *Pinkerton* v. *United States*, 238 U.S. 640 (1946).

quirement comes from a separate provision. 18 U.S.C. 924(c)(4). There is thus no basis to conclude that Congress followed a consistent course of imposing a *mens rea* requirement for the conduct specified in each of the sentencing factors in Clauses (i), (ii), and (iii).

3. The purpose of imposing a higher mandatory minimum when a firearm "is discharged" counsels against reading Section 924(c)(1)(A)(iii) as imposing a mens rea requirement

a. The purpose of the sentencing enhancement in Section 924(c)(1)(A)(iii) supports the conclusion that no separate *mens rea* must be shown to enhance a sentence based on the discharge of the firearm. Sentencing considerations routinely reflect not only an offender's relative moral culpability but also the resulting harm or risk of harm from the manner in which the crime was carried out. *Harris*, 536 U.S. at 553.

Here, the language Congress chose for Clause (iii) suggests concern about the risk of harm caused by the discharge, not simply the culpability of the person who caused the discharge of the firearm. That conclusion follows from Congress's use of the passive voice to describe when the enhancement applies. As discussed, the language used—"the firearm is discharged"—shows that Congress was indifferent as to the mental state (or even the identity) of the discharger. See *Watson*, 128 S. Ct. at 584. What Congress made pivotal was whether "certain facts [we]re present" in the "manner in which [the] basic crime was carried out." *Harris*, 536 U.S. at 553 (quoting *Castillo*, 530 U.S. at 126).

That is a quintessentially legislative judgment, and it is a reasonable one. The discharge of a firearm creates increased risks that injury or death will result, that

violence will be used in response, and that victims will be terrorized to an even greater extent than when the firearm is brandished. The risk of those harms arises even if the firearm is discharged accidentally. And a person who brings a loaded firearm, ready to fire, to a violent or drug trafficking crime creates the risk that it will be intentionally *or* inadvertently discharged. As then-Senator Biden explained with respect to the need for the possession prong in the same amendment that added the discharge sentencing enhancement: "the underlying public policy relates to whether or not someone is going to, in the act of committing a particular crime, carry with him or her a weapon that either enhances the prospect that they might *accidentally* use it—if there is no gun, they can't use it—or that they take it along with the express purpose of using it." *Violent and Drug Trafficking Crimes: The* Bailey *Decision's Effect on Prosecutions Under 924(c): Hearings Before the Comm. on the Judiciary United States Senate*, 104th Cong., 2d Sess. 14 (1996) (emphasis added); *id.* at 10 ("[T]here are hundreds of cases * * * where the person never intended to use the gun, but panicked. But the result is the same. Somebody is injured, somebody is dead, somebody is in trouble."). The same legislative judgment is reflected in the discharge sentencing enhancement. If an offender wishes to avoid the possibility of that enhancement for an unintended discharge, he can leave the firearm unloaded or, at the least, engage its safety lock.

Moreover, as discussed more fully below, see pp. 38-40, *infra*, defendants are routinely punished based on unintended consequences or unknown aspects of their own actions, or the foreseeable if unintended actions of their confederates, see *Pinkerton* v. *United States*, 238

U.S. 640 (1946), when those unintended or unknown consequences or aspects are part of the natural chain of events triggered by their illegal conduct. One obvious example is the felony-murder rule: if a defendant commits an unintended homicide while he is engaged in the commission or attempted commission of some other felony, the defendant can be convicted of, and punished for, murder. See, *e.g.*, *United States* v. *Matos-Quinones*, 456 F.3d 14, 18 n.2 (1st Cir.) ("under the federal felony-murder rule, a defendant can be convicted of first-degree murder even though he never intended (even conditionally) to inflict physical harm on the victim"), cert. denied, 549 U.S. 1088 (2006).

b. Citing the D.C. Circuit's decision in *Brown*, 449 F.3d at 156, petitioner contends (Br. 13-15) that the purpose of the tiered mandatory minimums in Clauses (i), (ii), and (iii) is to punish more severely conduct that is "increasingly blameworthy," rather than increasingly likely to cause harm. *Id.* at 13.[6] But, as the D.C. Circuit recognized, those clauses address "increasingly culpable *or harmful conduct*," and "discharges of a firearm are more likely to cause severe injury or even death than mere brandishing." *Brown*, 449 F.3d at 156, 157 (emphasis added). The D.C. Circuit, in nevertheless reading an additional *mens rea* requirement into the discharge sentencing enhancement, essentially substituted its own policy judgment for that of Congress: "as between an intentional brandishing and a purely accidental dis-

---

[6] Petitioner claims (Br. 13-14) that the brandishing of a firearm "does not, in and of itself, increase the risk of harm to others." But when an individual brandishes a firearm, as opposed to simply carrying it without displaying it, he increases the risk that someone will respond with a weapon and that victims will panic. The risk of those harms is even greater when the firearm is discharged.

charge, the increment in risk, given the less reprehensible intent, seems inadequate to explain a congressional intent to add three years." *Id.* at 157. The D.C. Circuit's speculation as to how much additional risk of harm or injury Congress thought was sufficient to warrant increasing the mandatory minimum, however, cannot overcome the plain language of the provision, which imposes no intent requirement. See *Gonzales*, 520 U.S. at 10 ("Given this clear legislative directive, it is not for the courts to carve out statutory exceptions based on judicial perceptions of good sentencing policy.").

A defendant who does intentionally discharge the firearm or one who causes injury from a discharge (whether accidental or not) can be punished still more severely. If a sentencing court concludes that a defendant who has intentionally discharged a firearm is more culpable and should receive a higher sentence, the language and structure of Section 924(c)(1)(A) permit that result. Clause (iii) provides only that the minimum sentence when a firearm "is discharged" must be at least ten years; the statute permits up to life imprisonment. See *Harris*, 536 U.S. at 554 ("Since the subsections alter only the minimum, the judge may impose a sentence well in excess of seven years, whether or not the defendant brandished the firearm."). Thus, the graduation of culpability that the D.C. Circuit attributed to Congress can be fully addressed under the scheme as written, without importing an extra-textual intent requirement.

4. Congress's rejection of proposals that would have been more amenable to petitioner's construction indicates that it did not require an intent to discharge the firearm

Because the text of Section 924(c)(1)(A)(iii) provides a clear answer to the question in this case, the Court need not consult the provision's legislative history. If that history is consulted, however, it supports the conclusion that the discharge sentencing factor contains no *mens rea* requirement.

In 1998, Congress added the discharge sentencing factor as Section 924(c)(A)(1)(iii) and, when it did so, it added it in its present form. P.L. 386, § 1(a)(1), 112 Stat. 3469. In contrast to the version ultimately enacted, earlier attempts to amend Section 924(c) had language that might have made "discharging" an element of the crime; indeed, some proposals contained an explicit *mens rea* requirement. In 1990, Senator Gramm proposed a bill that would have added a 20-year mandatory sentence for "[w]hoever * * * discharges a firearm with intent to injure another person." See 136 Cong. Rec. 16,225 (1990). In 1991, a bill passed the Senate that would have replaced "uses or carries" with "discharges, uses, carries or otherwise possesses." See S. 1241, 102d Cong., 1st Sess. § 1212, at 137 (1991). And in 1995, Representative Barr proposed a bill that would have provided for a 20-year sentence if a person "discharged a firearm with the intent to injure another person." See H.R. 1488, 104th Cong., 1st Sess. § 3, at 6 (1995), 141 Cong. Rec. 11,085 (1995). Those legislative efforts all failed.

Instead, in 1998, Congress amended Section 924(c) to add, *inter alia*, new penalties, including the sentencing factor at issue here. See P.L. 386, § 1(a)(1), 112 Stat.

3469.[7] The final language and structure of the new sentencing factors resulted from a compromise between the House and Senate. As originally introduced in the House, the bill would have amended the statute to apply "if the firearm is discharged *during and in relation to the crime*." H.R. 424, 105th Cong., 1st Sess. 2 (introduced Jan. 9, 1997) (emphasis added). Petitioner seeks to read the quite different enacted language as containing such an "in relation to" qualifier. But the House's ultimate version, much less the enacted version, did not contain that "during and in relation to" language in the "discharge" sentencing enhancement. See H.R. 424, 105th Cong., 2d Sess. (1998) (passed by House).

The House's final version employed the active verb "discharges" and would have structured Section 924(c)(1) such that each of the verbs—"possesses," "brandishes," and "discharges"—would start a new subsection flowing from a revised principal paragraph. H.R. Rep. No. 344, 105th Cong., 1st Sess. 2-3, 11-12 (1997).[8] That proposal would have been somewhat more

---

[7] In response to this Court's decision in *Bailey* v. *United States*, 516 U.S. 137 (1995), which had interpreted "uses" in the statute to require "active employment" of the firearm during and in relation to the predicate crime, *id.* at 150, the 1998 amendment also expanded the scope of the criminal offense by adding that anyone "who, in furtherance of any [crime of violence or drug trafficking] crime, possesses a firearm," commits an offense under Section 924(c)(1)(A). See P.L. 386, § 1(a)(1), 112 Stat. 3469.

[8] The version as passed by the House, in relevant part, would have amended Section 924(c) to replace paragraph (1) with the following:

> "(1) A person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United

amenable to treating "discharge" as part of the *actus reus* of the offense. Cf. *United States* v. *Williams*, 128 S. Ct. 1830, 1839 (2008) (reading the word "knowingly," when it was set off by a dash from and "introduce[d]" two distinct subsections, as modifying the two subsections in their entirety, rather than just the verbs that introduced each subsection). But Congress did not enact the House version; instead it enacted a provision similar to the Senate version. That bill included the "discharge" factor as a separate sentencing enhancement and used the passive "is discharged" language. S. 191, 105th Cong., 2d Sess. § 1 (as reported Nov. 6, 1997).

Petitioner contends (Br. 21) that this legislative choice can be explained because, "[d]espite the different (and rather awkward) structure [in the Senate bill], there is no indication that legislators understood this language to differ in meaning from that in the House bill." But the best indication that legislators understood the language to differ is the fact that they chose the Senate's language over the House's language. See *INS* v.

States—

(A) possesses a firearm in furtherance of the crime, shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime, be sentenced to imprisonment for 10 years;

(B) brandishes a firearm, shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime, be sentenced to imprisonment for 15 years; or

(C) discharges a firearm, shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime, be sentenced to imprisonment for 20 years;

except that if the firearm is a machinegun or destructive device or is equipped with a firearm silencer or firearm muffler, such additional sentence shall be imprisonment for 30 years.

H.R. Rep. No. 344, *supra*, at 2.

Cardoza-Fonseca, 480 U.S. 421, 442-443 (1987) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.") (internal quotation marks omitted); see also 144 Cong. Rec. 25,036 (1998) (statement of Rep. McCollum) (stating that the final language "represents a compromise between the House and the Senate"). Although petitioner points to (Br. 23 & n.9) the House Report for the proposition that the Committee understood that "during and in relation to" modifies "brandishes" and "discharges," that Report analyzed the *House* version, which (as discussed above) differed significantly from the version ultimately enacted. See H.R. Rep. No. 344, *supra*, at 2.

Petitioner's discussion of the legislative history of Section 924(c)(1)(A) (Br. 15-25) is notable for its focus on the principal paragraph of the section, which sets forth the complete crime, rather than on the sentencing factors. See, *e.g.*, *id.* at 15 ("The statute has always included some form of intent requirement."). But the question here is not what *mens rea* must be shown for the offense of conviction—the use or carrying of a firearm during and in relation to a crime of violence or the possession in furtherance of any such crime. Rather, the question is what must be shown to invoke the separately delineated sentencing factors. As the drafting history confirms, nothing is required beyond the requirements stated in the text.

5. Petitioner's construction is not necessary to avoid absurd results

Petitioner contends (Br. 11) that "in relation to" must modify the sentencing factors to prevent "absurd results," such as subjecting a defendant to the discharge enhancement "if the gun used during the crime had been discharged at some point long before or after the offense," *id.* at 12. That argument overlooks the nature of sentencing factors.

This Court explained in *Harris* and *Castillo* that "[t]raditional sentencing factors often involve . . . special features of the manner in which a basic crime was carried out." *Harris*, 536 U.S. at 553 (quoting *Castillo*, 530 U.S. at 553). For such sentencing factors to apply, they must bear some connection to the offense of conviction, but there need not be a *mens rea* requirement. Rather, the inquiry is whether "certain facts are present" in "the manner in which [the] basic crime was carried out." *Ibid.*

Applying that test to petitioner's hypotheticals does not produce "absurd results." The sentencing factors in Section 924(c)(1)(A) describe a subset of Section 924(c)(1)(A) offenses. The conduct or action (brandishing or discharging) thus must occur in the course of the offense of conviction and involve "the firearm" that forms the basis for the conviction. If, for example, the firearm is discharged "at some point long before or after the offense," Pet. Br. 12, that discharge would not be part of the manner in which the Section 924(c)(1)(A) crime was committed. But if the firearm is "appropriated and discharged" by someone other than the defendant, such as "a law enforcement officer or bank teller," that event is a foreseeable harm that flows from the manner of commission of the offense. A closer case is if

the "defendant's weapon accidentally discharged when he dropped it to comply with a police request to do so." *Ibid.* (quoting *Brown*, 449 F.3d at 157). The answer to that question would turn on whether the Section 924(c) offense was still ongoing at the moment of compliance. But however that question is resolved, it would not justify straining grammar and the statutory text by applying the "in relation to" element to the "is discharged" sentencing factor. The firearm that is discharged already must have the requisite relationship to the underlying crime. And there is nothing absurd about Congress concluding that an offender should be subject to greater punishment if, while using or carrying a loaded firearm during and in relation to a crime of violence or drug trafficking crime, or possessing it in furtherance of such a crime, he is careless enough with the firearm that it accidentally discharges.

Here, of course, petitioner displayed his weapon and threatened bank employees, and then reached over a teller, who was on her knees below her teller station, to remove cash from a teller drawer while holding the pistol in one hand. He then "pulled the trigger," J.A. 79, apparently accidentally, while the firearm was close to the teller's head, J.A. 29. The "accident" horrified the teller's colleagues, who feared she had been shot. J.A. 22. Such reckless disregard of human life with the effect of terrorizing the victims certainly falls within Congress's intended ambit for the ten-year mandatory minimum sentence in Clause (iii).

B. No Presumption Requires Reading A Separate *Mens Rea* Requirement Into The Sentencing Factor At Issue Here And, In Any Event, Any Such Presumption Would Be Rebutted

Petitioner contends (Br. 25-26) that, if the statutory language does not by its terms supply a *mens rea* requirement for the "discharge" sentencing factor, this Court should nonetheless rely on background interpretive principle to supply one. He bases that argument on the presumption that "a criminal statute will be construed to require proof of at least general intent 'absent a clear statement from Congress that *mens rea* is not required.'" *Ibid.* (quoting *Staples*, 511 U.S. at 618). He further contends that the presumption should apply here, on the theory that a *mens rea* requirement should be presumed for the "particular *conduct* that gives rise to liability under subparagraph (iii)," namely, the discharge. *Id.* at 34. No such presumption applies here.

1. Petitioner's argument is inconsistent with Harris

As an initial matter, petitioner's argument once again conflicts with the Court's statutory holding in *Harris*. Petitioner suggests that the "discharge" of the firearm is the relevant *actus reus* "that gives rise to *liability* under subparagraph (iii)." Pet. Br. 34 (emphasis added). But it is a misnomer to speak of liability under a sentencing factor. "Liability" results from committing the offense defined in the principal paragraph in Section 924(c)(1)(A). See *Harris*, 536 U.S. at 556. The discharge of the firearm, *Harris* makes clear, does not result in liability for a new criminal offense. Rather, it is a "special feature[] of the manner in which [the] basic crime was carried out" and subjects a defendant to the

higher mandatory minimum sentence set forth in Clause (iii). *Harris*, 536 U.S. at 553.

Nor can petitioner draw support by analogizing (Pet. Br. 28-29) the sentencing enhancements in Clauses (ii) and (iii) to the common-law crime of assault. As an initial matter, he relies on the definition of "brandish"—displaying a firearm "in order to intimidate"—to claim a "close[] match[] [with] the common law offense of criminal assault." *Id.* at 29. That definition, however, expressly provides a *mens rea* requirement, so it cuts against, rather than supports, the notion that one must be implied. See pp. 18-20, *supra*. "Discharge," by contrast, does not bear a resemblance to common law criminal assault—especially when used in the passive voice. It is a distinct aspect of the manner in which the crime was committed that manifests a significant increased risk of physical injury and trauma. But even assuming that "discharge" did bear a resemblance to common-law assault, "[t]he canon on imputing common-law meaning applies only when Congress makes use of a statutory *term* with established meaning at common law," *Carter* v. *United States*, 530 U.S. 255, 264 (2000), and no such term was borrowed here. As this Court explained in *Harris*, "there is no * * * federal tradition of treating brandishing and discharging as offense elements." 536 U.S. at 553.

2. The bases for the common-law presumption in favor of* mens rea *are not present here

Petitioner nevertheless suggests that interpreting the sentencing factor in Clause (iii) as "dispensing with an intent element would criminalize 'innocent conduct,'" namely, certain accidental discharges of the firearm. Pet. Br. 34. But the bases for the presumption of a *mens*

rea requirement—reflection of a background principle against which Congress enacts criminal provisions and protection against criminalizing innocent conduct—are lacking here.

a. The presumption that Congress generally intends a *mens rea* requirement when defining a crime is based on an "inference of the intent of Congress." *United States* v. *Balint*, 258 U.S. 250, 253 (1922); accord, *e.g.*, *Staples*, 511 U.S. at 604-605. That inference is derived from the principle that when Congress legislates "in light of the background rules of common law in which the requirement of some *mens rea* for a crime is firmly embedded," it is presumed to know and incorporate those rules. *Id.* at 605 (internal citation omitted); see *Morissette* v. *United States*, 342 U.S. 246, 252 (1952) ("courts assumed that the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation"); *id.* at 263.[9]

---

[9] Some lower courts have applied that presumption to the offense-defining portion of Section 924(c)(1)(A). See, *e.g.*, *United States* v. *Santeramo*, 45 F.3d 622, 623-624 (2d Cir. 1995) ("Although [S]ection 924(c)(1) does not explicitly describe the mental state required for a violation, knowledge of the facts constituting the offense ordinarily is implicit in a criminal statute that does not expressly provide a mental element.") (citing *X-Citement Video*, 513 U.S. at 70-71); *United States* v. *Nava-Sotelo*, 354 F.3d 1202, 1205 (10th Cir. 2003), cert. denied, 541 U.S. 1035 (2004). But it is doubtful whether that background rule applies to the principal offense, for two reasons. First, because every Section 924(c)(1)(A) violation involves an underlying crime that has its own *mens rea* requirement, there is no risk that Section 924(c)(1)(A) would criminalize "otherwise innocent conduct." *Carter*, 530 U.S. at 269. Second, it may be that the "in relation to" and "in furtherance of" elements of the offense require at least knowledge of the firearm's connection to the offense. See *Santeramo*, 45 F.3d at 624; *United States* v. *Dahlman*, 13 F.3d 1391, 1400 (10th Cir. 1993), cert. denied, 511

In contrast to the common law's requirement of *mens rea* for most criminal offenses, petitioner has cited no corresponding "universal and persistent," *Morissette*, 342 U.S. at 250, practice under the common law of requiring a separate *mens rea* for any facts on which a judge relies to increase the sentence within the statutory maximum. Indeed, this Court's cases suggest only a background presumption limited to offense elements. See, *e.g.*, *Carter*, 530 U.S. at 268 ("the presumption in favor of scienter demands only that we read subsection (a) as requiring proof of *general intent*—that is, that the defendant possessed knowledge *with respect to the actus reus of the crime*") (second emphasis added); *X-Citement Video*, 513 U.S. at 72 ("the standard presumption in favor of a scienter requirement should apply to each of the *statutory elements* that criminalize otherwise innocent conduct") (emphasis added); *Balint*, 258 U.S. at 251-252 ("[T]he general rule at common law was that the scienter was a necessary element in the indictment and proof of every crime, and this was followed in regard to statutory crimes even where the statutory definition did not in terms include it.").[10] In contrast, the Court has recognized in another context that the very sentencing

---

U.S. 1045 (1994); *United States* v. *Guiterrez*, 978 F.2d 1463, 1467 (11th Cir. 1992). In any event, the question is not presented here, as Count 2 of the indictment charges that petitioner acted "knowingly," J.A. 12, and the district court instructed the jury that the government had to prove that he "knowingly" carried or possessed the firearm. 5/3/2006. Tr. 155.

[10] Petitioner quotes *Morissette*'s statement about the deep understanding of the need for "[a] relation between some mental element and *punishment* for a harmful act." Pet. Br. 30 (quoting *Morissette*, 342 U.S. at 250-251). *Morissette*, however, was referring to "punishment" as shorthand for criminalizing conduct, not for a rule concerning the particular sentence to be imposed for that crime.

facts at issue here, "though stigmatizing and punitive," do not implicate the rights that obtain with respect to elements of the crime. *Harris*, 536 U.S. at 560; see *ibid.* ("These facts, though stigmatizing and punitive, have been the traditional domain of judges; they have not been alleged in the indictment or proved beyond a reasonable doubt."). And the courts of appeals have generally recognized that, unlike criminal offenses, *mens rea* is not inherent in defining sentencing enhancements.[11]

In the absence of an established common-law tradition that Congress presumably adopted, courts have no basis for presuming that Congress, by remaining silent, intended to include a *mens rea* requirement in a "paradigmatic sentencing factor," *Harris*, 536 U.S. at 553, such as the discharge of a firearm. Courts have no authority to read *mens rea* requirements into sentencing provisions when Congress has not provided them, for it is the function of the legislature, within constitutional limits, not the judiciary, to prescribe the prerequisites for a sentencing scheme.[12]

---

[11] See *United States* v. *Lavender*, 224 F.3d 939, 941 (9th Cir. 2000) ("Sentencing factors, however, are not separate criminal offenses and as such are not normally required to carry their own mens rea requirement."), cert. denied, 531 U.S. 1098 (2001); accord, *e.g.*, *United States* v. *Saavedra*, 523 F.3d 1287, 1289-1290 (10th Cir. 2008); *United States* v. *Gamboa*, 439 F.3d 796, 812 (8th Cir.), cert. denied, 549 U.S. 1042 (2006); *United States* v. *King*, 345 F.3d 149, 152-153 (2d Cir. 2003), cert. denied, 540 U.S. 1167 (2004); *United States* v. *Thornton*, 306 F.3d 1355, 1359 (3d Cir. 2002); *United States* v. *Fry*, 51 F.3d 543, 546 (5th Cir. 1995).

[12] Petitioner further contends (Br. 27-28) that the sentencing enhancements in Section 924(c)(1)(A) cannot be likened to "public welfare" or "regulatory" offenses. The government does not rely on any such analogy. In the case of public welfare statutes, the presumption that criminal offenses include *mens rea applies* because the statute

Thus, it is not, as petitioner suggests (Br. 30), the fact that "[t]his Court has never intimated that the presumption of *mens rea* does not apply to 'sentencing enhancements'" that is significant; it is instead the *absence* of decisions from this Court applying the presumption to sentencing enhancements. That judicial silence means that Congress would have had no warning that sentencing factors would be deemed to contain implied, non-textual *mens rea* elements. Nor is it clear how Congress could have negated such implications had it wished to do so. Because Congress did not legislate against a legal background requiring sentencing facts or enhancements to contain a separate *mens rea* requirement, and because Congress is entrusted with defining federal statutory crimes and punishments, see *Staples*, 511 U.S. at 604, it would be unwarranted for this Court to infer a *mens rea* requirement into Clause (iii).

b. Not only have courts *not* presumed that sentencing factors implicitly require distinct *mens rea*, the reasons for such a presumption for offense elements do not apply in this context. Significantly, the concern about "criminaliz[ing] a broad range of apparently innocent conduct," *Liparota* v. *United States*, 471 U.S. 419, 426 (1985), that underlies the common law's inclusion of scienter in criminal offenses is not implicated here. The

---

defines a crime, but it is *overcome* by statutory evidence based on the subject matter and penalties, that Congress intended to override it. See generally *Staples*, 511 U.S. at 605-619 (discussing the public welfare statutes and rejecting the government's argument that the offense at issue was such a statute). Here, in contrast, the presumption is *inapplicable* because there is no background universal and long-standing practice against which Congress legislated of requiring *mens rea* for any fact a judge relies on to increase a sentence within a statutory maximum.

sentencing enhancement in Clause (iii) applies only after an offender has been convicted of using or carrying a firearm during and in relation to, or possessing a firearm in furtherance of, a crime of violence or drug trafficking crime. In that circumstance, the commission of not only the underlying violent or drug offense, but also the separate firearm offense in Section 924(c)(1)(A), establishes the offender's requisite "vicious will." *Morissette*, 342 U.S. at 251. Moreover, there is no potentially "innocent conduct" associated with using a firearm to commit a violent felony or drug trafficking crime. Once offenders use a gun to commit a violent or drug offense, they "understand the wrongful nature of their act," and the purpose of the intent requirement to distinguish them "from those who do not" has been accomplished; the law "does not [further] require knowledge of the precise consequences that may flow from that act once aware that the action is wrongful." *X-Citement Video*, 513 U.S. at 73 n.3; see *Carter*, 530 U.S. at 269-270 ("once this mental state and *actus reus* are shown, the concerns underlying the presumption in favor of scienter are fully satisfied, for a forceful taking—even by a defendant who takes under a good-faith claim of right—falls outside the realm of the 'otherwise innocent'"); *United States* v. *Feola*, 420 U.S. 671, 685 (1975) (noting, in rejecting scienter requirement regarding assault victim's status as a federal officer, that "[t]he situation is not one where legitimate conduct becomes unlawful solely because of the identity of the individual or agency affected").[13]

---

[13] Thus, the Court's concern in *Staples* that criminalizing possession of a machine gun, absent proof of knowledge of the characteristics that make it a machine gun, would risk criminalizing innocent conduct given the "long tradition of widespread lawful gun ownership by private individuals," is not implicated. 511 U.S. at 610; see *id.* at 614-615.

Petitioner asserts (Br. 33) that this Court has never held that the presumption of *mens rea* applies only when *mens rea* is necessary to separate wrongful conduct from innocent conduct. But as this Court stated in *Carter*, "*only* that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct'" must be read into a statute. 530 U.S. at 256-257 (emphasis added) (quoting *X-Citement Video*, 513 U.S. at 72). If no such *mens rea* is necessary because the defendant already has committed wrongful conduct and there is no possible innocent conduct, it follows that the presumption does not apply. See *X-Citement Video*, 513 U.S. at 72 ("the presumption in favor of a scienter requirement should apply to each of the statutory elements *that criminalize otherwise innocent conduct*") (emphasis added); *Staples*, 511 U.S. at 619 ("the usual presumption that a defendant must know *the facts that make his conduct illegal* should apply") (emphasis added).[14]

Petitioner further argues (Br. 34) that "[a]n intent to do wrong cannot be extrapolated from one criminal act to all of the person's conduct without distending '*mens rea*' beyond any recognizable contours." See *id.* at 33 ("It is of no moment whether the particular defendant may be guilty of *other offenses*.") (emphasis added). But the discharge enhancement is not a separate offense. See *Harris*, 536 U.S. at 552. Nor is the enhancement based solely on the underlying "violent or drug trafficking crime." See Pet. Br. 35. Rather, the enhancement results because the underlying criminal act (violation of

---

[14] Although petitioner posits the possibility of assertedly "innocent" discharges, it is noteworthy that the examples he hypothesizes (Pet. Br. 34) do not include his own conduct. And the proper answer to those hypotheticals does not demand importation of a novel intent requirement. See pp. 29-30, *supra*.

the separate firearm offense in Section 924(c)(1)(A)) has produced an additional harm, even if unintended. As Blackstone put it:

> [I]f any accidental mischief happens to follow from the performance of a *lawful* act, the party stands excused from all guilt: but if a man be doing any thing *unlawful*, and a consequence ensues which he did not foresee or intend, as the death of a man or the like, his want of foresight shall be no excuse; for being guilty of one offence, in doing antecedently what is in itself unlawful, he is criminally guilty of whatever consequence may follow the first misbehaviour.

4 William Blackstone, *Commentaries* *26-*27.

Consistent with that principle, it is routine for criminal defendants who have the same culpable mental state to be subject to different levels of punishment based on the often unplanned and unintended consequences of their actions. The felony-murder rule rests on just such a premise. See pp. 22-23, *supra*. Other examples abound. For example, attempts are generally punished less severely than completed crimes, see 2 Wayne R. LaFave, *Substantive Criminal Law* § 11.5(c), at 251 (2d ed. 2003) (*LaFave*), even though both groups of wrongdoers meant to commit precisely the same wrongful act. A defendant who sought only to wound his victim may find himself charged with manslaughter or even murder if the victim dies. See *id.* §§ 14.3, 14.4, 15.4(d), at 434, 436-437, 528. And, a person who knowingly chooses to commit one offense (for example, operating a car after using drugs) may find himself charged with a far greater one if his conduct results in harm to another person. 1 *LaFave* § 6.4(a), at 465; 2 *LaFave* § 15.5(a), at 531.

These examples underscore that criminal law often refrains from requiring a culpable mental state with respect to a fact that triggers increased punishment for a defendant who has already been determined to have committed a crime.

c. Petitioner's amici contend that the presumption of *mens rea* should apply to any statute that "requires additional punishment based on conduct beyond that required for conviction of the offense." NACDL Amicus Br. 7. The adoption of that broad presumption would not only be unprecedented. It would also risk disruption of a great deal of well-settled authority with respect to the construction of other federal criminal statutes.[15]

The most notable potential consequences would relate to the federal drug statutes. Any "knowing[] or intentional[]" manufacture, distribution, or possession with intent to distribute of "a controlled substance" is a federal crime unless the defendant has a valid permit. 21 U.S.C. 841(a). In addition, Congress has enacted a number of other provisions that prescribe enhanced punishment for those who engage in drug trafficking in a particular way or in a particular place. For example, a defendant "who violates section 841(a)(1)," and whose violation occurs "in or on, or within one thousand feet of" a school, is subject to "twice the maximum punishment" that would otherwise be authorized. 21 U.S.C. 860(a). The courts of appeals that have considered the question have uniformly held that 21 U.S.C. 841(a)(1)'s

---

[15] Petitioner, for his part, eschews a claim that the presumption of a *mens rea* requirement applies to "every sentencing enhancement," Pet. Br. 35 n.15, but does not explain how his theory would not logically lead to that result.

"knowingly" requirement does not require the defendant have been aware of his proximity to the school.[16]

The same is true with respect to determinations of drug quantity. The amount of drugs involved in a Section 841(a) offense can result in a substantial increase in the defendant's maximum sentence. Compare 21 U.S.C. 841(b)(1)(A), with 21 U.S.C. 841(b)(1)(C). As a result, this Court's decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), requires the government to prove drug quantity to the jury in order to obtain such an enhanced maximum sentence. See *United States* v. *Cotton*, 535 U.S. 625, 632 (2002). Notwithstanding that fact, however, the courts of appeals have uniformly held that the government need *not* prove that the defendant had knowledge of the quantity of the drugs involved. See, *e.g.*, *United States* v. *King*, 345 F.3d 149, 153 (2d Cir. 2003) (citing cases), cert. denied, 540 U.S. 1167 (2004).

3. Any such presumption would be rebutted here

In any event, even assuming a presumption of *mens rea* applies to sentencing enhancements, it would be, like any presumption, subject to rebuttal. Any such presumption would be rebutted here by the indications that Congress's omission of a *mens rea* "was not a slip of the legislative pen, nor the result of inartful draftsmanship, but was a conscious and not irrational legislative choice."

---

[16] See *United States* v. *Falu*, 776 F.2d 46, 50 (2d Cir. 1985); see also *United States* v. *Jackson*, 443 F.3d 293, 299 (3d Cir. 2006); *United States* v. *Cross*, 900 F.2d 66, 69 (6th Cir. 1990); *United States* v. *Dimas*, 3 F.3d 1015, 1022 (7th Cir. 1993); *United States* v. *Lewin*, 900 F.2d 145, 148 (8th Cir. 1990); *United States* v. *Pitts*, 908 F.2d 458, 461 (9th Cir. 1990); *United States* v. *DeLuna*, 10 F.3d 1529, 1534 (10th Cir. 1993) (aiding and abetting a 21 U.S.C. 860 violation); *United States* v. *Holland*, 810 F.2d 1215, 1222-1224 (D.C. Cir.), cert. denied, 481 U.S. 1057 (1987).

Bifulco v. *United States*, 447 U.S. 381, 400 (1980). Specifically, Congress omitted a *mens rea* requirement in the "discharge" provision while including one in the "brandish" provision; spoke in the passive voice; and did not pass the House versions which would have expressly qualified "discharges" with "during and in relation to" or have been amenable to the reading that "discharges" was part of the *actus reus* of the offense. See pp. 25-28, *supra*.

C. There Is No Reason To Resort To The Rule Of Lenity

Petitioner asserts (Br. 36-38) that the rule of lenity requires that Section 924(c)(1)(A)(iii) be construed to require proof that the firearm was discharged intentionally or knowingly. There is no warrant for resorting to that rule here.

Notwithstanding the clear lack of any requirement that the firearm be discharged intentionally or knowingly, petitioner contends (Br. 37) that Section 924(c)(1)(A)(iii) is ambiguous because the principal paragraph of the statute contains the phrase "in relation to." "The mere possibility of articulating a narrower construction, however, does not by itself make the rule of lenity applicable." *Smith*, 508 U.S. at 239. Rather, the rule is "reserved for cases where, [a]fter seiz[ing] every thing from which aid can be derived, the Court is left with an ambiguous statute." *Ibid.* (brackets in original) (internal quotation marks omitted); see *Callanan* v. *United States*, 364 U.S. 587, 596 (1961) ("The rule [of lenity] comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers.").

There is no "grievous ambiguity or uncertainty in the statute" such that, "after seizing everything from which aid can be derived," the Court "can make no more than a guess as to what Congress intended." *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998) (internal quotation marks omitted). The plain language of Section 924(c)(1)(A)(iii) imposes no requirement that the firearm was discharged knowingly or intentionally, and there is no reason—aside from an effort to *create* an ambiguity where none exists—to assume that the phrase "in relation to" in the opening paragraph of the statute—the paragraph that "list[s] the elements of a complete crime," *Harris*, 536 U.S. at 552—modifies the subsequent "paradigmatic sentencing factor[s]," *id.* at 553. See *Callanan*, 364 U.S. at 596 (rule of lenity "serves as an aid for resolving an ambiguity; it is not to be used to beget one").

Petitioner also argues (Br. 37) that the presumption of *mens rea* in criminal statutes renders Section 924(c)(1)(A)(iii) ambiguous. But as discussed above, there is no common law presumption of a separate *mens rea* for facts on which a judge relies to increase the sentence within the statutory maximum. In any event, the presumption cannot create ambiguity in an otherwise clear statute. See *Bifulco*, 447 U.S. at 387 ("Where Congress has manifested its intention, we may not manufacture ambiguity in order to defeat that intent.").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

EDWIN S. KNEEDLER
Acting Solicitor General
RITA M. GLAVIN
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
DEANNE E. MAYNARD
Assistant to the Solicitor General
VIJAY SHANKER
Attorney

FEBRUARY 2009

APPENDIX

1. 18 U.S.C. 924(c) provides:

Penalties

* * * * *

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section—

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition—

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

REPLY BRIEF

Supreme Court, U.S.
FILED
FEB 25 2009
OFFICE OF THE CLERK

No. 08-5274

IN THE

Supreme Court of the United States

CHRISTOPHER MICHAEL DEAN

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF OF PETITIONER

SARAH O'ROURKE SCHRUP
NORTHWESTERN UNIVERSITY
SUPREME COURT PRACTICUM
357 East Chicago Ave.
Chicago, IL 60611
(312) 503-8576

SCOTT J. FORSTER*
P.O. Box 102
Calhoun, GA 30703
(706) 625-1799

JEFFREY T. GREEN
QUIN M. SORENSON
AMY L. HANKE
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

February 25, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF	1
I. SECTION 924(C)(1)(A)(III) INCORPORATES A GENERAL INTENT ELEMENT	1
A. Section 924(c)(1)(A)(iii) Is Modified By "During And In Relation To"	1
B. The Legislative History Supports A General Intent Element	7
C. Interpreting § 924(c)(1)(A)(iii) Without A General Intent Element Would Produce Absurd Results	9
II. THE PRESUMPTION OF *MENS REA* APPLIES TO § 924(C)(1)(A)(III)	12
III. THE RULE OF LENITY REQUIRES THAT § 924(C)(1)(A)(III) BE INTERPRETED TO INCLUDE A GENERAL INTENT ELEMENT	18
CONCLUSION	20

TABLE OF AUTHORITIES

CASES Page

Bifulco v. *United States*, 447 U.S. 381 (1980) 14
Carter v. *United States*, 530 U.S. 255 (2000) 11, 16, 17
Clay v. *United States*, 537 U.S. 522 (2003) 6
Gustafson v. *Alloyd Co.*, 513 U.S. 561 (1995) 2, 10
Harris v. *United States*, 536 U.S. 545 (2002) 4, 7, 12, 13
INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987) 8
Liparota v. *United States*, 471 U.S. 419 (1985) 14
Morissette v. *United States*, 342 U.S. 246 (1952) 12, 13
Nobelman v. *Am. Sav. Bank*, 508 U.S. 324 (1993) 3
Pinkerton v. *United States*, 328 U.S. 640 (1946) 15
Russello v. *United States*, 464 U.S. 16 (1983) 4, 5
Smith v. *United States*, 508 U.S. 223 (1993) 9, 10
United States v. *Brown*, 449 F.3d 154 (D.C. Cir. 2006) 10
United States v. *Burke*, 888 F.2d 862 (D.C. Cir. 1989) 14
United States v. *Hinckley*, 550 F.3d 926 (10th Cir. 2008), *petition for cert. filed*, No. 08-8696 (U.S. Feb. 9, 2009) 3
United States v. *King*, 345 F.3d 149 (2d Cir. 2003) 17

TABLE OF AUTHORITIES—continued

Page

United States v. *Lanier*, 520 U.S. 259 (1997) 14
United States v. *Matos-Quinones*, 456 F.3d 14 (1st Cir. 2006) 15
United States v. *Mobley*, 956 F.2d 450 (3d Cir. 1992) 17, 18
United States v. *U.S. Gypsum Co.*, 438 U.S. 422 (1978) 14, 19
United States v. *X-Citement Video, Inc.*, 513 U.S. 64 (1994) 3, 4
Watson v. *United States*, 128 S. Ct. 579 (2007) 4, 5, 6
Williamson v. *United States*, 512 U.S. 594 (1994) 13

STATUTES

18 U.S.C. § 924(c) 2, 4
18 U.S.C. § 3559(c) 10

LEGISLATIVE HISTORY

S. 191, 105th Cong. § 1 (as introduced Jan. 22, 1997) 17
H.R. 1488, 104th Cong. § 3 (as introduced Apr. 7, 1995) 8
Violent and Drug Trafficking Crimes: The Bailey Decision's Effect on Prosecutions Under 924(c): Hearing Before the S. Comm. on the Judiciary, 104th Cong. (1996) 9
144 Cong. Rec. H10,330 (daily ed. Oct. 9, 1998) 9

TABLE OF AUTHORITIES—continued

Page

OTHER AUTHORITIES

American Heritage Book of English Usage (1996) 2, 3

3 Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutes and Statutory Construction* (6th ed. 2003) 14

U.S. Sentencing Guidelines Manual § 2A2.2(b)(2) 17

REPLY BRIEF

The government's brief is full of sound and fury, but ultimately contributes little. It criticizes petitioner's reading of the statute as stylistically inelegant, his reliance on the presumption of *mens rea* as unprincipled, and his invocation of the rule of lenity as contrived. But it never backs these histrionics with reasoned argument, or provides a basis for rejecting the most reasonable interpretation of the statute, under which § 924(c)(1)(A)(iii) applies only if the firearm was discharged knowingly. And it never explains why the patently absurd results that would flow from its interpretation – which would impose a ten-year mandatory minimum sentence for an accidental discharge – should simply be ignored.

I. SECTION 924(C)(1)(A)(III) INCORPORATES A GENERAL INTENT ELEMENT.

Petitioner's opening brief demonstrated that the statutory language and legislative history of § 924(c)(1)(A) lead necessarily to the conclusion that the discharge provision requires proof of a knowing discharge. Pet'r Br. 7-25. The government offers nothing to discount this construction and, in fact, proposes a contrary interpretation that is so absurd as to support adoption of petitioner's construction.

A. Section 924(c)(1)(A)(iii) Is Modified By "During And In Relation To."

The government agrees that the adverbial clause "during and in relation to" in § 924(c)(1)(A) embodies an intent requirement which, if read to modify the verb "discharged" in subparagraph (iii), would demand proof that the discharge was at least knowing. Gov't Br. 13, 15, 33 n.9. It thus concedes a fundamental point: an "accidental" discharge is not

"in relation to" the knowing use of a firearm in the course of a crime. The government argues, however, that "in relation to" cannot apply to the discharge provision in light of (i) rules of style, (ii) other statutory language, and (iii) the statute's purpose. *Id.* at 11-24. None of these points is valid.

1. The government asserts that the discharge provision cannot be read to include an intent requirement simply because no such requirement appears therein. See *id.* at 12. This position, however, starts from a false premise. The discharge provision does in fact incorporate an intent requirement: the adverbial clause "during and in relation to" – with its intent requirement – appears *in the same sentence* as the phrase "is discharged" in the discharge provision. 18 U.S.C. § 924(c)(1)(A). That clause is placed before the series of verbs representing the conduct targeted by the statute, and is therefore properly read to apply to all of those verbs, including "discharged." *American Heritage Book of English Usage* 53 (1996). The division of the sentence among several provisions is not, under long-standing precedent of this Court, any basis for ignoring this relationship or assuming congressional intent to divorce the latter verbs from the antecedent adverb. See *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 570 (1995) ("[An] Act of Congress[] should not be read as a series of unrelated and isolated provisions.").

The government responds that it would have been more stylistically proper for Congress to have placed the modified verbs in closer proximity to the adverbial clause, or to repeat that clause in the latter provisions. Gov't Br. 15. But Congress need not follow *The Chicago Manual of Style* in drafting legislation. That a statute could have been phrased more cleanly or elegantly is no ground to disregard a

meaning that is otherwise plain, or to adopt an interpretation that is patently unreasonable. See, *e.g.*, *Nobelman* v. *Am. Sav. Bank*, 508 U.S. 324, 330-31 (1993) (refusing to read modifying clause as applicable only to immediate antecedent, although "th[at] reading of the clause is quite sensible as a matter of grammar"); see also *United States* v. *Hinckley*, 550 F.3d 926, 943 (10th Cir. 2008) ("[T]he possibility of misplaced modifiers is real [but such] grammatical heuristics can 'assuredly be overcome by other indicia of meaning.'") (quoting *Barnhart* v. *Thomas*, 540 U.S. 20, 26 (2003)), *petition for cert. filed*, No. 08-8696 (U.S. Feb. 9, 2009). Indeed, in *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64 (1994), this Court disregarded standard rules of grammar and read an *adverb* to modify several *nouns* in order to effect clear congressional intent. *Id.* at 68. No such linguistic gymnastics are required here: applying the adverbial clause "during and in relation to" to all subsequent verbs in the sentence, including "brandished" and "discharged," is reasonable and violates no relevant rules of grammar.[1]

That the statute's verbs appear in both the active and passive voice is immaterial. The meaning or effect of an adverb does not change when the modified verb switches from active to passive voice, and there is no reason to limit the scope of "in relation to" only to verbs appearing in one voice. See *American Heritage*, *supra*, at 4, 56-59. Certainly nothing suggests that Congress saw a meaningful

---

[1] Of course, had Congress intended "in relation to" to apply only to "use" and "carry," it could have easily transposed the adverbial clause *after* the relevant verbs (*i.e.*, "any person who uses or carries a firearm during and in relation to any crime of violence"), in which case there would be little doubt that the clause would not "travel down" to the latter verbs. Gov't Br. 13.

distinction between active and passive verbs in this context. To the contrary, the statute treats them as interchangeable, defining the passive verb "is brandished" by reference to the active form "brandishes." 18 U.S.C. § 924(c)(1)(A)(ii), (c)(4). While style guides might advise a parallel structure for the verbs in this series, the most reasonable reading of the statute cannot be defeated merely because Congress might have drafted it better. See, *e.g.*, *X-Citement Video*, 513 U.S. at 68.

Nor is it relevant that another adverbial clause, "in furtherance of," interrupts the statute's series of verbs. That clause, as explained in petitioner's opening brief, is set off from the remainder of the sentence by commas and can therefore be treated as grammatically distinct, neither restricting the scope of "in relation to" nor affecting the interpretation of "brandished" or "discharged." Pet'r Br. 10-11. And, in any event, because "in relation to" and "in furtherance of" have substantially similar meanings, *id.* at 11 n.4,[2] the inclusion of the latter clause can hardly be viewed as a reason to limit the former.

2. The government also claims that, even if "in relation to" could be read to modify the brandish and discharge provisions, incorporation of that phrase's *mens rea* requirement would be inconsistent with the statute's structure and language. Gov't Br. 11-13, 18-21. It cites several cases in support, including *Harris* v. *United States*, 536 U.S. 545 (2002), *Russello* v. *United States*, 464 U.S. 16 (1983), and *Watson* v.

---

[2] Although the government criticizes the suggestion that these phrases "carry substantially the same meaning," Gov't Br. 18 n.4, it relies on authorities making this very point, *id.* (citing *United States* v. *Avery*, 295 F.3d 1158, 1174 (10th Cir. 2002)).

United States, 128 S. Ct. 579 (2007). None of these opinions applies, much less controls, here.

The government brazenly asserts that *Harris* "confirm[s] that the phrase 'in relation to' does not modify the sentencing factor of 'discharge.'" Gov't Br. 15. *Harris* said no such thing. That opinion explained that the division of § 924(c)(1)(A) into a principal and sub-paragraphs indicates that the brandish and discharge provisions should be deemed "sentencing factors" for purposes of the rights to indictment, trial by jury, and proof beyond a reasonable doubt. 536 U.S. at 556. However, the Court never suggested that this division could or should be viewed as relevant to the statute's substantive interpretation, much less that it somehow defines the scope of "during and in relation to." *Harris* simply does not answer the question presented here.

Russello is likewise inapposite. *Russello* said that, "[w]here Congress includes particular language in one section of a statute but omits it in another, . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion and exclusion." 464 U.S. at 23 (quoting *United States* v. *Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). This might imply that, because § 924(c) defines "brandish" to require proof of a *particular* intent ("to intimidate"), no similar *particular* intent requirement should be read into the discharge provision (*e.g.*, "to injure"). However, it in no way suggests that a *general* intent requirement should not be read into the discharge provision (or into the brandish provision). Subsequent cases have in fact expressly cautioned against applying *Russello* in this way: *i.e.*, to presume the deliberate exclusion of certain language in one provision based on the inclusion of

qualitatively different language in another. *Clay* v. *United States*, 537 U.S. 522, 524 (2003) ("The *Russello* presumption . . . grows weaker with each difference in the formulation of the provisions under inspection.") (quoting *Columbus* v. *Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 435-36 (2002)).

Watson is also inapplicable. In holding that receipt of a firearm does not constitute firearm "use" for purposes of § 924(c)(1)(A), the Court distinguished § 924(d)(1) – which lists receipt as a way in which a firearm may "be used" – on the ground that the passive phrasing in the latter provision reflects an "agnosticism . . . about who does the using." 128 S. Ct. at 584. But the Court never suggested, as the government argues, that a passive phrasing *per se* excludes a *mens rea* requirement or necessarily obviates the otherwise required causal link between the defendant and the proscribed conduct. *Watson* was focused on the meaning of "use," and cannot inform the scope of the phrase "during and in relation to" or its application to the discharge and brandish provisions of § 924(c)(1)(A).

3. The government agrees that the increasing penalties of § 924(c)(1)(A) are intended, at least in part, to punish increasingly culpable conduct. See Gov't Br. 21-24. Its proposed construction, however, would deny any role for culpability in many cases. For example, under its view, an individual whose concealed weapon accidentally discharges during a crime would be subject to the ten-year minimum sentence, even though that person would undoubtedly be *less* culpable than one who actively brandishes (or, obviously, purposefully discharges) the firearm during the crime. No explanation is offered by the government for this discrepancy between its interpretation and the statute's purpose.

Of course Congress *could* have decided to craft a statute which depends solely on risk of harm, without regard to culpability. But § 924(c)(1)(A) is not that statute. It is phrased in terms of individual actions, rather than effects. Indeed, the statute explicitly requires proof of an "[intent] to intimidate" to support application of the "is brandished" provision – rebutting conclusively the government's suggestion that the passive voice alone reflects congressional "indifferen[ce] as to the mental state . . . of the discharger." Gov't Br. 21.

The government cannot salvage its position by calling the discharge provision a mere "sentencing consideration," or by suggesting that the provision enhances judicial discretion. *Id.* at 21, 24. The discharge provision does not grant discretion; it takes it away. *Harris*, 536 U.S. at 554. A judge faced with a defendant whose firearm had accidentally discharged during a crime would, under the government's view, be precluded from imposing a sentence of less than ten years' imprisonment. Gov't Br. 24. In contrast, under the petitioner's interpretation, the judge could consider both culpability *and* risk of harm to determine whether the sentence should be less or more than ten years. Only this construction preserves that discretion *and* accords with the statutory language without sacrificing the statute's purpose.

B. The Legislative History Supports A General Intent Element.

Numerous statements in the committee report and during the debates confirm that Congress expected the ten-year mandatory minimum sentence to apply only when an individual discharges the firearm knowingly. Pet'r Br. 22-24. Unable to counter this evidence directly, the government instead relies on

misdirection and out-of-context quotes to infer a contrary intent. For example, it argues that, because prior proposals to amend § 924(c) expressly included a *mens rea* requirement within the discharge provision, the absence of such a requirement in the enacted version necessarily means Congress intended that no *mens rea* should apply. See Gov't Br. 25-26.

This position, again, overlooks the key distinction between particular and general intent. In the earlier proposals, Congress expressly included a *particular* intent requirement – "with the intent to injure another person." *E.g.*, H.R. 1488, 104th Cong. § 3 (as introduced Apr. 7, 1995). That this requirement was excluded from the enacted statute does not in any way suggest that Congress wished to exclude a *general* intent requirement from the final version. See *supra* p. 5.

Although Congress did not enact the House version of the bill, which indisputably applied "during and in relation to" to the discharge provision, see Pet'r Br. 19-20; see also Gov't Br. 26-27, it did not clearly "reject" that version, nor did it enact the Senate version wholesale. Rather, the final bill was a *compromise* that incorporated elements from both the House and Senate versions.[3] The government's attempt to glean from this a congressional intent to dispense with *mens rea* greatly overreaches; there is simply no indication that members of the Senate disagreed with statements by House members that the brandish and discharge provisions are modified by the "during and in relation to" language. Indeed,

---

[3] For this reason, *INS* v. *Cardoza-Fonseca*, 480 U.S. 421 (1987), a case in which Congress rejected the Senate version of a bill outright and instead enacted the House bill, is inapposite here. Gov't Br. 27-28.

the only cited difference between the bills was the disparate length of the penalties imposed – the Senate version imposed five to ten years' imprisonment, while the House version called for ten to twenty years'. See 144 Cong. Rec. H10,330 (daily ed. Oct. 9, 1998) (statement of Rep. Scott).

Moreover, the statement by then-Senator Biden that the statute addresses the risk of "accidental[]" firearm use, cited by the government in support of its position, Gov't Br. 22, actually supports the contrary conclusion. Senator Biden was talking not about the statute's discharge provision, but about its possession clause. *Violent and Drug Trafficking Crimes: The Bailey Decision's Effect on Prosecutions Under 924(c): Hearing Before the S. Comm. on the Judiciary*, 104th Cong. 11, 14 (1996). He explained that the risk of accidental firearm use justifies imposition of the *base* mandatory minimum sentence; he never suggested that enhanced penalties were necessary to address this risk (in fact, he was opposed to proposed penalty enhancements). *Id.* Put in proper context, this statement accords with petitioner's interpretation, under which the base sentence applies when the discharge was accidental while the enhanced sentence applies when the discharge was knowing.

C. Interpreting § 924(c)(1)(A)(iii) Without A General Intent Element Would Produce Absurd Results.

The government argues that, because subparagraph (iii) includes "no words of qualification or limitation," it should apply whenever the firearm is discharged, regardless of who – or even *what* – commits the act. Gov't Br. 12-13. This is simply nonsensical. "Brandish" and "discharge" represent ways in which a perpetrator "uses" a firearm during an offense. See *Smith* v. *United States*, 508 U.S. 223,

237-38 (1993); cf. 18 U.S.C. § 3559(c)(2)(D) (defining "firearms use" to include when a firearm is "brandished, discharged, *or otherwise used*") (emphasis added). Those provisions should therefore apply only when the perpetrator himself brandishes or discharges the firearm. To read the provisions as applying regardless of who or what acts upon the weapon would completely unmoor them from the principal paragraph. See *Gustafson*, 513 U.S. at 570 (counseling against "isolat[ing]" parts of a statute for purposes of interpretation). Indeed, perhaps for this reason, the government has disavowed this very interpretation in other cases. See *United States* v. *Brown*, 449 F.3d 154, 157 (D.C. Cir. 2006) ("[A]t oral argument the government conceded . . . that the statute . . . wouldn't render an armed robber liable for the discharge by a law enforcement officer or bank teller who got a hold of the robber's gun and used it to threaten the robber.").

Taken to its logical end, the government's construction would render the provision applicable even when the firearm is discharged long before or after the crime. After all, if the discharge provision is not modified by "during and in relation to," and operates without "qualification or limitation," Gov't Br. 13, then there is no basis to infer a temporal restriction (just as, according to the government, there is no basis to infer a causal restriction) on when or how the discharge occurs.

The government disclaims support for such a broad reading, asserting (without citation to authority) that because the brandish and discharge provisions "describe a subset of Section 924(c)(1)(A) offenses . . . [t]he conduct . . . must occur in the course of the offense." *Id.* at 29. But the government cannot have it both ways. Its proposed statutory construction is

premised on reading subparagraphs (ii) and (iii) in isolation, unqualified by the language in the principal paragraph. *Id.* Now, however, to avoid a concededly absurd construction, it tries to exploit the very link between the principal paragraph and the subparagraphs that it has earlier denied. The government can succeed in this case only by reading the phrase "is discharged" without "qualification or limitation," *id.* at 12-13, and under that view it must accept that the discharge provision applies regardless of when, where, or how the discharge occurs.

The results that would flow from this interpretation are obviously absurd. For example, the discharge provision would, under the government's view, apply to a drug dealer who keeps an unloaded and locked firearm in his home if an officer discovers the firearm during a raid, unlocks and loads it, and fires into the air in order to stop a drug transaction (or to protect himself). See *id.* at 29-30. It would also apply – if the discharge provision is not modified by the adverb "during" – if the firearm is discharged weeks (or years) before or after the crime, regardless of whether it is discharged by the defendant, by an unknown or unrelated third party, or even by police. There is simply no basis to assume that Congress could have intended these results.[4]

---

[4] The government's claim that application of the discharge provision does not seem "absurd" under the particular facts of this case, *see* Gov't Br. 30, is debatable and, more important, irrelevant. This Court has often recognized that, in interpreting a statute, it is appropriate to look beyond the facts of the particular case and consider how the provision would be applied in other circumstances. *E.g.*, *Carter* v. *United States*, 530 U.S. 255, 269 (2000) (examining hypothetical situations to construe statute).

The government acknowledges that the discharge provision should apply only when there is some "connection" between the crime and the conduct. *Id.* Rather than reading this language into the statute, it is better to interpret the existing language to reach a similar result, holding that "during and in relation to" modifies the brandish and discharge provisions.

II. THE PRESUMPTION OF *MENS REA* APPLIES TO § 924(C)(1)(A)(III).

The government's arguments against application of the presumption of *mens rea*, like those concerning the statutory language and legislative history, lack substance. Relying on irrelevant authorities and criticisms, it never addresses the fundamental point that the discharge provision imposes criminal penalties, and under a long line of cases should be strictly construed to include a *mens rea* requirement.

1. It is telling that the government commences its discussion of the presumption of *mens rea* with a case that says nothing about the presumption, *Harris*. *Harris* characterized the principal paragraph of § 924(c)(1)(A) as the "offense" and the brandish and discharge provisions as "sentencing factors." 536 U.S. at 556. But it never suggested – as the government now argues, see Gov't Br. 29 – that this distinction has any bearing on the statute's substantive interpretation. It certainly never said that the latter provisions do not impose "liability" or are not subject to the presumption of *mens rea*. *Harris* simply does not speak to this case.

The government's broad reading of *Harris* also conflicts with prior decisions of this Court. This Court said in *Morissette* v. *United States*, 342 U.S. 246 (1952), that the presumption of *mens rea* applies

to statutes that impose "punishment." *Id.* at 250-51.[5] There can be no doubt that § 924(c)(1)(A)(iii) falls within this category: it mandates several years additional imprisonment when the defendant is found to have engaged in specific conduct. To refuse to apply the presumption in this case would therefore run afoul of *Morissette* without in any way advancing the holding in *Harris*.[6]

2. The suggestion that there is no "established common-law tradition" of applying the presumption of *mens rea* to sentencing enhancements, Gov't Br. 35, is both misleading and inaccurate. The shift to judicial discretion in sentencing did not occur until the mid-19th century, and sentencing factors like § 924(c)(1)(A)(iii) were not introduced until the 1970s and 1980s. *Harris*, 536 U.S. at 558. Few cases have applied the presumption of *mens rea* to sentencing provisions for the simple reason that, until recently, there was no opportunity to do so.

---

[5] No support is offered for the government's semantically dubious, and substantively irrelevant, assertions that *Morissette*'s reference to "punishment" was merely "shorthand for criminalizing conduct" and that sentencing provisions do not impose "liability." Gov't Br. 34 n.10; *cf. Harris*, 536 U.S. at 568 (noting that sentencing factors "bear on punishment"); *Williamson* v. *United States*, 512 U.S. 594, 604 (1994) (equating reduction in sentence with reduced "criminal liability").

[6] The criticism leveled at petitioner's analogy between the discharge provision and the common law crime of assault, on the grounds that a firearm discharge "manifests a significant increased risk of physical injury" and the discharge provision borrows no common law term of art, *see* Gov't Br. 32, ignores the traditional definition of assault, *see* Pet'r Br. 28-29 (citing authorities defining assault as conduct manifesting a risk of harm), and cases relying on such analogies despite the absence of borrowed terms of art, *see id.* at 28-29 & n.10 (citing cases).

More fundamentally, even absent a history of cases applying the presumption itself, there does exist a long and established tradition of applying the same principles to provisions affecting sentence and punishment. The presumption of *mens rea* arises from the doctrine of strict construction, closely related to the rule of lenity. See *Liparota* v. *United States*, 471 U.S. 419, 427 (1985); *United States* v. *U.S. Gypsum Co.*, 438 U.S. 422, 437 (1978); see also *United States* v. *Lanier*, 520 U.S. 259, 266 (1997); *United States* v. *Burke*, 888 F.2d 862, 866 n.6 (D.C. Cir. 1989). That doctrine, which states that a criminal statute should be interpreted as narrowly as reasonably possible, is of "ancient" origin and has been consistently applied both to statutes that define criminal conduct and to those that prescribe punishment. 3 Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutes and Statutory Construction* § 59:3 (6th ed. 2003). This Court has in fact rejected arguments that the rule of lenity should be limited only to offense-defining elements of a criminal statute. *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980). There is, in other words, a "universal and persistent" practice of applying the principles underlying the presumption of *mens rea* to sentencing statutes, which clearly supports applying the presumption to § 924(c)(1)(A)(iii).

3. The government also argues that, because an individual subject to § 924(c)(1)(A)(iii) has already been found guilty of a crime, there is no risk of punishing "innocent conduct" and no need to presume a *mens rea* requirement. Gov't Br. 36-40. It asserts, in essence, that the wrongful intent present in the underlying act – whether the violent or drug trafficking crime or using or carrying a firearm during that crime – can be transferred to the

subsequent act, constituting proof that the latter conduct was also wrongful. For support, it relies on conspiracy cases, such as *Pinkerton* v. *United States*, 328 U.S. 640 (1946), and statutes permitting punishment for unintended consequences, such as the felony-murder provision. See Gov't Br. 20-22, 39-40.

These authorities provide no support for the government. *Pinkerton* said only that an individual may be held responsible for the acts of a co-conspirator, even if he had no knowledge of them, if the acts were committed in furtherance of the conspiracy. 328 U.S. at 646-47. It did not hold, as the government suggests, that *mens rea* is not required for the underlying acts. To the contrary, an individual may be convicted of an offense under *Pinkerton* only if he or she entered into the conspiracy *intentionally* and the co-conspirator engaged in the offense conduct *intentionally* (or at least knowingly).[7] See *id.* The same is true in the felony-murder situation: a defendant may be punished for an unintended death resulting from a felony only if he or she committed the felony itself *intentionally*. See *United States* v. *Matos-Quinones*, 456 F.3d 14, 18 n.2 (1st Cir. 2006).

This is quite a different case. The question here, which the government largely ignores, is whether a

---

[7] Indeed, *Pinkerton* principles already animate this case. Both Mr. Dean and Mr. Lopez were convicted of aiding and abetting another in using a firearm based on the finding that one of them had *intentionally* used the firearm. J.A. 136. However, if neither of them had intended to use the firearm, then neither would be liable under *Pinkerton*. 328 U.S. at 646-48; *see also* Pet'r Br. 8-9 (noting *mens rea* requirement). It is therefore entirely consistent with *Pinkerton* to hold that an accidental and unintentional discharge cannot subject either a defendant *or* a co-conspirator to liability under § 924(c)(1)(A)(iii).

defendant should be subject to additional *criminal liability* for conduct that is itself *unintentional*. Neither *Pinkerton* nor the other authorities on which the government relies speak to this issue.

The government also says that an "innocent" defendant would not have risked an accidental discharge by carrying a loaded firearm during a crime, or would have at least taken appropriate precautions such as leaving the firearm unloaded or engaging the safety lock. Gov't Br. 22. But, obviously, an accidental discharge is still possible in these hypotheticals: the perpetrator could mistakenly leave a round in the gun or could improperly engage the safety lock, resulting in an unintentional discharge during the crime. By acknowledging that the defendant's conduct in these situations is "innocent," and apparently should not implicate the ten-year mandatory minimum sentence of § 924(c)(1)(A)(iii), the government simply concedes that some *mens rea* requirement must be read into the statute, demanding proof that the firearm was discharged not merely by accident or mistake.

4. Applying the presumption here will not lead to a "disruption . . . of well-settled authority," or the incorporation of a *mens rea* requirement in every sentencing provision. *Id.* at 40. The presumption mandates only that level of scienter "necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter* v. *United States*, 530 U.S. 255, 269 (2000). Courts have, on this basis, refused to demand proof that a defendant had knowledge of the particular quantity of drugs, the conduct of a co-conspirator in furtherance of a crime, or the risk of death from a felony. Gov't Br. 40-41. In all of these cases, the defendant was already engaged in intentional, wrongful conduct – carrying drugs,

participating in a criminal conspiracy, or committing a felony – and his or her lack of knowledge as to the possible additional wrongful consequences of that conduct could not render the underlying conduct "innocent." *E.g.*, *United States* v. *King*, 345 F.3d 149, 153 (2d Cir. 2003) (per curiam). This case would in fact present a very different question if subparagraph (iii) had been phrased strictly in terms of consequences rather than conduct: *e.g.*, imposing a minimum sentence if "the death of any person results." S. 191, 105th Cong. § 1 (as introduced Jan. 22, 1997). There would be grounds to believe, in that circumstance, that no *mens rea* applies since the underlying conduct (*i.e.*, "use" of a firearm during and in relation to a crime) is itself intentional and wrongful. See *Carter*, 530 U.S. at 269-70. In contrast, the statute as written – and interpreted by the government – proscribes conduct (*i.e.*, "discharge") which is itself not wrongful. Cf. *supra* pp. 10-11 (noting that the government's construction would cover discharges unrelated to the crime).[8]

---

[8] Several fundamental distinctions between § 924(c)(1)(A)(iii) and the United States Sentencing Guidelines likewise suggest that application of the presumption in this case would not necessarily require its application to all Guidelines provisions, many of which also rely on findings of specific conduct. *Cf.*, *e.g.*, U.S. Sentencing Guidelines Manual § 2A2.2(b)(2) (increasing offense level for aggravated assault if "a firearm was discharged"). For example, the Guidelines are promulgated by the United States Sentencing Commission, not passed directly by Congress as law, and for that reason it may be argued that the presumption should not apply to Guidelines provisions. *See*, *e.g.*, *United States* v. *Mobley*, 956 F.2d 450, 452-53 (3d Cir. 1992). Also, unlike § 924(c)(1)(A)(iii), the Guidelines are merely advisory and do not mandate the imposition of punishment, and may arguably be viewed as "regulatory" provisions to which the presumption does not apply. *See id.* Finally, there may be evidence that Congress or the Commission did not intend for a

It is the government's position that would result in a doctrinal sea change. That interpretation would, for the first time, limit the presumption solely to "elements" of the offense, and deny its application to an entire class of penal statutes. See, *e.g.*, Gov't Br. 33 & n.9. Rather than take this extraordinary course, the Court should hold that the presumption applies to all criminal provisions and demands incorporation of a *mens rea* requirement in § 924(c)(1)(A)(iii), as the language and history of the statute already suggest.

III. THE RULE OF LENITY REQUIRES THAT § 924(C)(1)(A)(III) BE INTERPRETED TO INCLUDE A GENERAL INTENT ELEMENT.

The statute is, at the very least, ambiguous as to whether proof of *mens rea* should be required with respect to § 924(c)(1)(A)(iii). An intent requirement is written into the statute itself ("during and in relation to"), and placed in such a way that it is most reasonably read to apply to the discharge provision. *Supra* pp. 1-7. The legislative history confirms this interpretation, and the presumption of *mens rea* generally supports incorporation of an intent requirement in criminal provisions. *Supra* pp. 7-9, 12-18. There is, in short, every reason to credit petitioner's proposed construction.

The government's only real response is that subparagraph (iii) does not itself contain a *mens rea* requirement. *E.g.*, Gov't Br. 12. But this Court has said on numerous occasions that "far more than the

---

mens rea requirement to apply to the Guidelines as a whole, or to specific provisions. *See id.* (noting Guidelines amendment eliminating scienter requirement). In any event, whether and how the presumption of *mens rea* applies to the Guidelines will be subject to a different analysis based on considerations that are not implicated here.

simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement." *Gypsum*, 438 U.S. at 437-38. Moreover, as between the competing interpretations offered for § 924(c)(1)(A), only the government's has been alleged or shown to produce absurd results. *Supra* pp. 9-12. Notwithstanding the government's bluster, its interpretation is certainly subject to at least reasonable dispute.

"The rule of lenity therefore applies." Pet'r Br. 38. Section 924(c)(1)(A)(iii) should be interpreted in the manner favorable to the defendant, to require proof that the discharge was volitional, and not merely accidental, unintentional, or involuntary.

CONCLUSION

For these reasons, the Court should reverse the decision of the Court of Appeals for the Eleventh Circuit with instructions to vacate the judgment of the District Court and remand for resentencing.

Respectfully submitted,

SARAH O'ROURKE SCHRUP
NORTHWESTERN UNIVERSITY SUPREME COURT PRACTICUM
357 East Chicago Ave.
Chicago, IL 60611
(312) 503-8576

SCOTT J. FORSTER*
P.O. Box 102
Calhoun, GA 30703
(706) 625-1799

JEFFREY T. GREEN
QUIN M. SORENSON
AMY L. HANKE
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

February 25, 2009

AMICUS CURIAE BRIEF

FILED
JAN 12 2009
OFFICE OF THE CLERK

117

(3)

NO. 08-5274

IN THE

Supreme Court of the United States

CHRISTOPHER MICHAEL DEAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NATIONAL ASSOCIATION OF FEDERAL DEFENDERS, AND FAMILIES AGAINST MANDATORY MINIMUMS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

PAMELA HARRIS
NAT'L ASS'N OF CRIMINAL
DEFENSE LAWYERS
Co-Chair, Amicus Committee
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

DAVID SALMONS
Counsel of Record
ROBERT V. ZENER
BINGHAM MCCUTCHEN LLP
2020 K Street, NW
Washington, D.C. 20006
(202) 373-6000

Attorneys for Amici Curiae

[Additional Counsel Listed Inside]

GDTH 492PS2

81261 17

Additional Counsel:

HENRY J. BEMPORAD
CO-CHAIR, AMICUS COMMITTEE
NATIONAL ASSOCIATION OF FEDERAL DEFENDERS
OFFICE OF THE FEDERAL PUBLIC DEFENDER
FEDERAL BUILDING, SUITE B-207
727 East Durango Boulevard
San Antonio, TX 78206
(210) 472-6700

MARY PRICE
VICE PRESIDENT AND GENERAL COUNSEL
FAMILIES AGAINST MANDATORY MINIMUMS
1612 K Street, NW
Suite 700
Washington DC 20006
(202) 822-6700

PETER GOLDBERGER
FAMM Litigation Advisory Committee
50 Rittenhouse Place
Ardmore, PA 19003
(610) 649-8200

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTERESTS OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. THE PRESUMPTION OF *MENS REA* APPLIES TO STATUTORY SENTENCING FACTORS AND PRESERVES THE SENTENCING JUDGE'S TRADITIONAL DISCRETION TO CONSIDER WHETHER THE DEFENDANT'S CONDUCT WAS INTENTIONAL	5
A. Sentencing Enhancements Fall Within The Rationale Of The *Mens Rea* Presumption That Accidental Conduct Does Not Normally Warrant Severe Criminal Punishment.	6
B. Congress Should Not Be Presumed To Have Limited The Sentencing Judge's Traditional Discretion To Consider The Defendant's Blameworthiness	7
C. Consideration Of *Mens Rea* Is Especially Important Under Section 924(c) Because The Minimum Sentence Is Imposed In The Vast Majority Of Cases	10

TABLE OF CONTENTS - Continued

		Page
D.	The Rule Of Lenity Independently Applies To Sentencing Factors And Requires An Ambiguous Criminal Statute To Be Read Favorably To The Defendant	11
II.	IF AMBIGUOUS, SECTION 924(c)(1)(A)(iii) MUST BE CONSTRUED TO EXCLUDE ACCIDENTAL DISCHARGE OF A FIREARM FROM THE REQUIREMENT OF AN ADDITIONAL SENTENCE	13
A.	The Statutory Language Is At Least Ambiguous	13
B.	The Legislative History Supports The Conclusion That The Discharge Enhancement Requires Intent	16
CONCLUSION		18

TABLE OF AUTHORITIES

Page

CASES

Bailey v. United States, 516 U.S. 137 (1995) 16, 17

Bifulco v. United States, 447 U.S. 381 (1980) . 4, 12, 16

Carter v. United States, 530 U.S. 255 (2000) 4, 16

Dennis v. United States, 341 U.S. 494 (1951) 2

Dolan v. U.S. Postal Service, 546 U.S. 481 (2006) 14

Gall v. United States, 128 S. Ct. 586 (2007) 9, 10

Gustafson v. Alloyd Co., 513 U.S. 561 (1995) 14

Gutierrez de Martinez v. LaMagno,
515 U.S. 417 (1995) 16

Harris v. United States,
536 U.S. 545 (2002) 3, 7, 8, 10

Hughey v. United States, 495 U.S. 411 (1990) 12

Jarecki v. G.D. Searle & Co., 367 U.S. 303 (1961) 14

Koon v. United States, 518 U.S. 81 (1996) 9

Ladner v. United States, 358 U.S. 169 (1958) 12

Liparota v. United States, 471 U.S. 419 (1985) 12

TABLE OF AUTHORITIES - Continued

Page

McMillan v. Pennsylvania, 477 U.S. 79 (1986) 8

Morissette v. United States,
342 U.S. 246 (1952) 3, 5, 7

Ratzlaf v. United States, 510 U.S. 135 (1994) 12

Reves v. Ernst & Young, 494 U.S. 56 (1990) 14

Smith v. United States, 508 U.S. 223 (1993) 14, 17

Staples v. United States, 511 U.S. 600 (1994) 6, 15

United States v. Bailey, 444 U.S. 394 (1980) 6

United States v. Bazile,
209 F.3d 1205 (10th Cir. 2000) 10

United States v. Booker, 543 U.S. 220 (2005) 8, 10

United States v. Brown,
449 F.3d 154 (D.C. Cir. 2006) 15

United States v. Burk,
888 F.2d 862 (D.C. Cir. 1984) 7

United States v. Granderson,
511 U.S. 39 (1994) 12

United States v. R.L.C.,
503 U.S. 291 (1994) 12

TABLE OF AUTHORITIES - Continued

Page

United States v. Santos, 128 S. Ct. 2020 (2008).....12

United States v. U.S. Gypsum Co.,
438 U.S. 422 (1978).....2, 12

United States v. X-Citement Video, Inc.,
513 U.S. 64 (1994).....6, 12

STATUTES

Pub. L. 105-386, § 1, 112 Stat. 3469 (1998) 17

18 U.S.C. § 924(c)(1).....14

18 U.S.C. § 924(c)(4).....14, 15, 17

18 U.S.C. § 3551(a).....5, 9

18 U.S.C. § 3553(a).....9

18 U.S.C. § 3553(a)(1) 5

LEGISLATIVE HISTORY

144 Cong. Rec. S126670 (daily ed. Oct. 16, 1998)
(statement of Sen. DeWine).....16

MISCELLANEOUS

U.S. Sentencing Commission, Guidelines Manual
§ 2K2.4(b) 10

TABLE OF AUTHORITIES - Continued

Page

U.S. Sentencing Commission, Sourcebook of Federal Sentencing Statistics, Fiscal Year 2007 (Table N, National Comparison of Sentence Imposed and Position Relative to the Guideline Range, Fiscal Year 2007) 11

INTERESTS OF *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit organization with a direct national membership of more than 12,500 attorneys, in addition to more than 35,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association ("ABA") recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates. NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice.

The National Association of Federal Defenders was formed in 1995 to enhance the representation provided under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution. The Association is a nationwide, nonprofit, volunteer organization whose membership includes attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. One of the guiding principles of the Association is to promote the fair adjudication of justice by appearing as

[1] Pursuant to Supreme Court Rule 37.6, counsel for amici represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than amici, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

amicus curiae in litigation relating to criminal-law issues, particularly as those issues affect indigent defendants in federal court. The Association has appeared as *amicus curiae* in litigation before the Supreme Court and the federal courts of appeals. The Association joins in this brief because it believes judges should impose sentences based on the individuals before them, rather than follow arbitrary minimum sentences that have no connection to those defendants' culpability.

Families Against Mandatory Minimums ("FAMM") is a national, nonprofit, nonpartisan organization of 25,000 members. Founded in 1991, FAMM's primary mission is to promote fair and proportionate sentencing policies by challenging inflexible and excessive penalties required by mandatory sentencing laws. By mobilizing prisoners and their families who have been adversely affected by unjust sentences, FAMM illuminates the human face of sentencing as it advocates for state and federal sentencing reform. FAMM advances its charitable purposes in part through education of the general public and selected amicus filings in important cases.

SUMMARY OF ARGUMENT

Under settled law, a presumption of *mens rea* applies to criminal statutes. "The existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Dennis v. United States*, 341 U.S. 494, 500 (1951). Criminal statutes, including 18 U.S.C. § 924(c), must be construed in light of this principle. *See United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436-37 (1978).

The government argued in opposition to the petition that the presumption of *mens rea* applies only to

the elements of a crime, not to sentencing enhancements. But sentencing enhancements are "stigmatizing and punitive," *Harris v. United States,* 536 U.S. 545, 560 (2002), and as such fall within the basic rationale that there must ordinarily be "[a] relation between some mental element and punishment." *Morissette v. United States*, 342 U.S. 246, 250-51 (1952). Thus, even if the Court were to conclude that Section 924(c)(1)(A)(iii) does not make explicit that its 10-year sentencing enhancement applies only to knowing or intentional discharges, *mens rea* must nonetheless be presumed, and the enhancement must be read to exclude accidental discharges.

Requiring a "mental element" for enhanced punishment under Section 924(c)(1)(A)(iii) comports well with the traditional judicial discretion under federal law to consider the defendant's blameworthiness in determining the sentence. Here the difference between an accidental and an intentional discharge of a firearm has a direct and significant bearing on the degree of the defendant's blameworthiness. Accordingly, absent clearly expressed intent to the contrary, Congress should not be presumed to have limited the sentencing judge's discretion to consider whether the defendant's discharge of his firearm was intentional or accidental.

Section 924(c)(1)(A)(iii) is at least ambiguous as to whether an accidental discharge requires a 10-year sentencing enhancement, and, indeed, is better read to exclude accidental discharges from the enhancement. The statute establishes an escalating series of increasingly severe penalties for firearm use, with the most severe penalty reserved for discharge of the firearm. With respect to the less severe penalties, it is undisputed that Congress has

required intent. In that context, it is fair to conclude that Congress did not intend to impose the most severe penalty on accidental conduct. Moreover, under the rule of lenity, any ambiguity as to whether some level of intent was required must be resolved in favor of excluding an accidental discharge from the enhancement.

The rule of lenity and the presumption of *mens rea* are closely associated. Both are longstanding canons for construing Congressional intent in criminal statutes in the absence of clear language, and this Court and others have often relied on the rule of lenity to imply a *mens rea* element into a criminal statute. It is settled law that the rule of lenity applies to all criminal statutes, including those imposing mandatory minimum sentences. *Bifulco v. United States,* 447 U.S. 381, 387 (1980). There is no reason to give the presumption of *mens rea* a narrower application.

The government argued in opposition to the petition that Congress' explicit requirement of intent for the less severe penalty for "brandish" in the Act means that Congress did not envision *any* intent requirement for the most severe penalty for "discharge." But Congress required a *particular* intent for the less severe penalties. From that, one might reasonably conclude that Congress found it necessary explicitly to require a specific intent as to the lesser provisions, but assumed that it was not necessary to spell out the background assumption of general intent. Such a conclusion accords with the rule that, while a criminal statute typically must have an explicit requirement for specific intent, general intent is presumed. *Carter v. United States,* 530 U.S. 255, 268-70 (2000). Because imposition of severe criminal punishment for accidental conduct runs

contrary to principles "as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil," *Morissette*, 342 U.S. at 250, it cannot be inferred that Congress intended to impose such punishment absent clear language requiring it.

ARGUMENT

I. THE PRESUMPTION OF *MENS REA* APPLIES TO STATUTORY SENTENCING FACTORS AND PRESERVES THE SENTENCING JUDGE'S TRADITIONAL DISCRETION TO CONSIDER WHETHER THE DEFENDANT'S CONDUCT WAS INTENTIONAL.

Under federal law, a sentencing judge is required to take into account, among other things, the "circumstances of the offense." 18 U.S.C. § 3553(a)(1). This rule applies unless another statute "specifically" requires otherwise. *Id.* § 3551(a). Where one of those "circumstances" is the discharge of a firearm, normally a sentencing judge would have the discretion to consider whether the defendant intended to fire. Section 924(c)(1)(A)(iii)'s sentencing enhancement for cases in which "the firearm is discharged" does not specifically require a minimum additional sentence of 10 years for an accidental discharge. Accordingly, under Section 3551(a), the statute must not be read to impose such a limitation on the judge's discretion under Section 3553(a) to consider culpability when choosing a sentence. So construed, the Gun Control Act and the Sentencing Reform Act together embrace the traditional presumption of *mens rea*. Congressional intent to curtail a judge's traditional sentencing discretion to consider the defendant's blameworthiness cannot be presumed absent clear language to the contrary.

A. Sentencing Enhancements Fall Within The Rationale Of The *Mens Rea* Presumption That Accidental Conduct Does Not Normally Warrant Severe Criminal Punishment

Amici agree with petitioner's argument that Section 924(c)(1)(A)'s requirement that the firearm be used or carried "in relation to" the underlying crime, or possessed "in furtherance of" that crime, sets forth a *mens rea* requirement that expressly applies to the "discharge" sentencing enhancement. However, even if the Court were to accept the government's position that the statute does not expressly require an intentional discharge, that would not be the end of the matter. "[S]ilence on this point by itself does not necessarily suggest that Congress intended to dispense with a conventional *mens rea* element . . . ." *Staples v. United States*, 511 U.S. 600, 605 (1994). Intent with respect to culpability-creating facts is a traditional element of *mens rea*, and it is generally presumed absent a clear Congressional statement to the contrary. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 70 (1994); *United States v. Bailey*, 444 U.S. 394, 403-06 (1980). Because "the discharge of the firearm inside the bank was a surprise even to Dean and, thus, was likely accidental," Pet. App. 9a, that intent was absent here.

The Court "must construe the statute in light of the background rules of the common law." *Staples*, 511 U.S. at 605. One of those "firmly embedded" rules is "the requirement of some *mens rea* for a crime." *Id.* While the court of appeals acknowledged that the presumption of *mens rea* is a bedrock rule for construing criminal statutes, it concluded that it applies only to the elements of a crime, not to sentencing enhancements. Pet. App. 9a-10a. That dis-

tinction cannot hold. Sentencing enhancements are "stigmatizing and punitive." *Harris*, 536 U.S. at 560. "They must be strictly construed, and strict liability should not be presumed." *United States v. Burke*, 888 F.2d 862, 866 n.5 (D.C. Cir. 1984). They fall within the basic rationale of the presumption of *mens rea* a belief that is "universal and persistent in mature systems of law" that there should be "[a] relation between some mental element and punishment." *Morissette*, 342 U.S. at 250-51.

The government argued in opposition to the petition that a defendant who has been found guilty of the underlying crime is no longer an innocent person and thus *mens rea* which it claims is intended solely to separate the innocent from the guilty is no longer relevant. But *mens rea* requirements do more than separate the guilty from the innocent; they establish levels of culpability and punishment. (That is why, for example, premeditated murder is punished more severely than negligent homicide.) Where, as here, the statute requires additional punishment based on conduct beyond that required for conviction of the offense, the background presumption that the defendant must have intended that conduct, or at least have caused it knowingly, applies with full force. Otherwise, there would be no "relation between some mental element and punishment," a result courts should not lightly presume Congress intended. *Id.*

B. Congress Should Not Be Presumed To Have Limited The Sentencing Judge's Traditional Discretion To Consider The Defendant's Blameworthiness

The presumption of *mens rea* arose historically in the context of whether a crime had been committed, rather than in the context of whether the judge

properly exercised his sentencing discretion. That is because defining the elements of a crime is all that criminal statutes traditionally did, and sentencing issues did not reach the appellate courts. Indeed, legislative mandates for increased punishment based on judicial findings of sentence-enhancing facts is a "new trend," first recognized by this Court in 1986. *United States v. Booker*, 543 U.S. 220, 236 (2005), discussing *McMillan v. Pennsylvania*, 477 U.S. 79, 87-88 (1986); *Harris*, 536 U.S. at 560 (minimum sentence statutes "were for the most part the product of the 20th century, when legislatures first asserted control over the sentencing judge's discretion.").

This Court's view of such statutes as constitutional, so long as they impose a minimum sentence without increasing the statutory maximum, has depended in part on preservation of the traditional role of judges in determining sentences. *McMillan*, 477 U.S. at 91 ("Sentencing courts have traditionally heard evidence and found facts" without a prescribed burden of proof.); *Harris*, 536 U.S. at 560 (finding facts that are relevant to sentencing but are not elements of the crime "ha[s] been the traditional domain of judges."). The government distorts these cases by reading them to *undermine* the sentencing judge's traditional discretion to consider whether the defendant acted intentionally with respect to alleged aggravating circumstances in the manner in which the crime was committed.

"[U]nusual blameworthiness in the manner employed in committing a crime" is an element within the traditional judicial sentencing authority. *Booker*, 543 U.S. at 235. An interpretation of Section 924(c)(1)(A)(iii) that limits the judge's traditional sentencing discretion to consider the defendant's degree of blameworthiness with respect to the manner

in which the crime was committed should not be adopted absent clear legislative language. Such an interpretation certainly is not required by *Harris* or *McMillan*, which were intended to preserve, not to limit, the traditional discretion of sentencing judges.

Congress requires judges to impose a sentence that is "sufficient, but not greater than necessary" to satisfy the purposes of sentencing, *i.e.*, just punishment, deterrence, incapacitation and rehabilitation, 18 U.S.C. § 3553(a), unless "otherwise specifically provided." *Id.*, § 3551(a). In determining a particular sentence, judges must also take into account "the nature and circumstances of the offense." 18 U.S.C. § 3553(a). These requirements accord with the long-standing federal sentencing tradition of considering "every convicted person as an individual and every case as . . . unique." *Gall v. United States*, 128 S. Ct. 586, 598 (2007), quoting *Koon v. United States*, 518 U.S. 81, 113 (1996). To interpret Section 924(c)(1)(A)(iii) to require a 10-year sentencing enhancement when a firearm "is discharged" regardless of whether the discharge is intentional or accidental would contradict the general Congressional policy of individualized sentencing. Such an interpretation requires much more explicit language than Congress has used here.

Of course, mandatory minimum sentencing statutes necessarily limit the discretion of sentencing judges, and must be enforced within constitutional limits. But that does not settle the question of how these statutes should be construed. The Sentencing Reform Act answers that question, in part, by removing mandatory minimums from discretionary sentencing under Section 3553(a) only to the extent "specifically" provided for in the mandatory minimum statute. 18 U.S.C. § 3551(a). Since Section

924(c)(1)(A)(iii) does not "specifically" require imposition of the increased mandatory minimum even in the absence of intent, it must be construed not to limit the judge's sentencing discretion in that way.

C. Consideration Of *Mens Rea* Is Especially Important Under Section 924(c) Because The Minimum Sentence Is Imposed In The Vast Majority Of Cases

In *Harris*, Justice Thomas observed that "almost all persons sentenced for violations of 18 U.S.C. § 924(c)(1)(A) are sentenced to 5, 7, or 10 years' imprisonment." *Harris*, 536 U.S. at 578 (Thomas, J., dissenting). As Justice Thomas pointed out, the Sentencing Guidelines provided (and still provide) that, in cases under Section 924(c), with irrelevant exceptions, "the guidelines sentence is the minimum term of imprisonment required by statute." U.S. Sentencing Commission, Guidelines Manual § 2K2.4(b). The availability of upward departures was limited; "departures are not available in every case, and in fact are unavailable in most." *Booker*, 543 U.S. at 234; *see United States v. Bazile*, 209 F.3d 1205 (10th Cir. 2000) (reversing life sentence under Section 924(c)(1)(C)(i) because district court had not used proper upward departure methodology).

Even after *Booker*, in the era of advisory guidelines, any upward departure requires a "justification . . . sufficiently compelling to support the degree of the variance." *Gall*, 128 S. Ct. at 597. Sentencing judges "must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process." *Id.* at 597 n.6. Current sentencing statistics continue to reflect that in the vast majority of cases the statutory minimum sentence (which, as noted, is also the Guideline sentence) is

still the sentence imposed.[2] Under this regime, where the statutory minimum sentence determines the sentence imposed in the vast majority of cases, it is particularly important to apply the presumption of *mens rea* to the statutory definition of the conduct that triggers the minimum sentence.

D. The Rule Of Lenity Independently Applies To Sentencing Factors And Requires An Ambiguous Criminal Statute To Be Read Favorably To The Defendant

Amici agree with petitioner that, once the statute as a whole is considered, Section 924(c) must be

[2] Current sentencing data for all federal criminal cases indicates that *Booker* has not resulted in any significant increase in above-guideline sentences. In fiscal year 2007, courts sentenced above the guideline range in only 1.7% of all cases. U.S. Sentencing Commission, Sourcebook of Federal Sentencing Statistics, Fiscal Year 2007 (Table N, National Comparison of Sentence Imposed and Position Relative to the Guideline Range, Fiscal Year 2007) *at* http://www.ussc.gov/ANNRPT/2007/SBTOC07.htm.

The above data concern all federal sentences. *Amici* also have reviewed U.S. Sentencing Commission monitoring data for fiscal years 2003-2006 concerning sentences under Section 924(c) (either alone or in combination with other counts). The percentage of sentences above the guideline range in these cases was 1.21%. The rate was 1.37% pre-*Booker* and 1.04% post-*Booker*. This data was obtained from the Interuniversity Consortium for Political and Social Research, which is the public repository for the annual "Monitoring of Federal Criminal Sentences" data files from the U.S. Sentencing Commission. Paul J. Hofer, J.D., Ph.D., former Senior Policy Analyst at the U.S. Sentencing Commission and current Adjunct Assistant Professor at Johns Hopkins University, obtained and analyzed the 924(c) data.

The lower rate of upward departures for 924(c) cases than others is consistent with the longstanding judicial discomfort with mandatory minimum sentencing laws.

read in favor of a *mens rea* requirement for the discharge enhancement. But to the extent that any ambiguity remains, the rule of lenity "demand[s] resolution of ambiguities in criminal statutes in favor of the defendant." *Hughey v. United States*, 495 U.S. 411, 422 (1990). Like the presumption of *mens rea*, the rule of lenity is an important "background principle" against which criminal statutes are interpreted. *X-Citement Video, Inc.*, 513 U.S. at 71; *Liparota v. United States*, 471 U.S. 419, 427 (1985).

The rule of lenity reinforces application of the presumption of *mens rea* to the sentencing enhancement in Section 924(c)(1)(A)(iii). The rule of lenity "applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose." *Bifulco*, 447 U.S. at 387; *see also Ladner v. United States*, 358 U.S. 169, 178 (1958) (rule of lenity applies to any question of statutory interpretation that would "increase the penalty that [the statute] places on an individual"); *United States v. Granderson*, 511 U.S. 39, 54 (1994); *United States v. R.L.C.*, 503 U.S. 291, 305-06 (1992). The rule of lenity has a strong link to the *mens rea* presumption, having served as a basis for "read[ing] a state of mind component into an offense even when the statutory definition did not in terms so provide." *U.S. Gypsum Co.*, 438 U.S. at 437. *See also Liparota*, 471 U.S. at 427-28 (relying on rule of lenity to extend the specified "knowing" *mens rea* requirement to all material elements of the statute.); *Ratzlaf v. United States*, 510 U.S. 135, 148 (1994) (rule of lenity would resolve any doubt as to scope of statutory "willfulness" requirement). The strong link between the rule of lenity and the presumption of *mens rea*, the fact that both are bedrock canons for construing criminal statutes that are less than clear, and the undoubted application of the former to sen-

tencing enhancements, strongly suggest that the latter also applies to sentencing enhancements.

The rule of lenity alone would provide an ample basis for resolving any ambiguity in Section 924(c)(1)(A)(iii) in favor the defendant. When there are two reasonable interpretations of a criminal statute, one favoring the defense and the other the prosecution, under the rule of lenity "the tie must go to the defendant." *United States v. Santos*, 128 S. Ct. 2020, 2025 (2008). As shown below, petitioner's interpretation of Section 924(c)(1)(A)(iii) is at least reasonable and in fact is the better reading of the statutory text. Even if the government's interpretation were also deemed reasonable, the petitioner's interpretation must prevail.

II. IF AMBIGUOUS, SECTION 924(c)(1)(A)(iii) MUST BE CONSTRUED TO EXCLUDE ACCIDENTAL DISCHARGE OF A FIREARM FROM THE REQUIREMENT OF AN ADDITIONAL SENTENCE.

A. The Statutory Language Is At Least Ambiguous

Amici agree with petitioner that the plain language of Section 924(c)(1) is best read as requiring *mens rea* for the 10-year sentencing enhancement for discharging a firearm. Section 924(c)(1) establishes an escalating series of required additional penalties for persons who commit any crime of violence or drug trafficking crime: (i) if "during and in relation to" the underlying crime the person "uses or carries a firearm," or in furtherance of the crime "possesses a firearm," the minimum additional sentence is 5 years; (ii) if "the firearm is brandished," the minimum additional sentence is 7 years; and (iii) if "the firearm is discharged," the minimum additional sen-

tence is 10 years. 18 U.S.C. § 924(c)(1). It is undisputed that proof of intent is required for the first item in this series. *Smith v. United States*, 508 U.S. 223, 237-38 (1993). It is also well-established that the second item of the series requires specific intent. 18 U.S.C. § 924(c)(4)(defining "brandish" to require an intent to intimidate).

In these circumstances, it is reasonable (or at the very least plausible) to read the third item of the series "is discharged" also to require some form of intent. Such a reading is supported by the canon that "a word is known by the company it keeps" (*noscitur a sociis)* a canon that "is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to Acts of Congress." *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006), quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961). In *Dolan* the Court applied the canon because a broader reading of the final term in the statutory list would have produced an "odd" result. *Dolan*, 546 U.S. at 487. Similarly here, it would be odd—to say the least to conclude that in an escalating series of increasingly severe penalties, Congress intended to reserve the most severe penalty for an unintended act, while imposing lesser penalties on intentional acts.

The term "discharged" must be "understood against the background of what Congress was attempting to accomplish." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995), quoting *Reves v. Ernst & Young*, 494 U.S. 56, 63 (1990). In the context of a series of increasingly severe penalties for criminal conduct associated with firearms, interpreting the most severe penalty as reserved for unintentional conduct would "giv[e] unintended breadth" to the statute. *Dolan*, 546 U.S. at 486, quoting *Jarecki*, 367

U.S. at 307. Indeed, that Congress imposed the most severe penalty of the statute where the firearm is "discharged" lends additional support to the conclusion that it did not intend to eliminate *mens rea*. *Staples*, 511 U.S. at 619 ("the penalty attached to § 5861(d) suggests that Congress did not intend to eliminate a *mens rea* requirement for violation of the section.").

The government offers a competing interpretation, which notes that Section 924(c)(1) specifically requires an intent element for the "brandish" item in the penalty series. Because this language is missing from the "discharge" item, the government argues, it should be inferred that intent is not required.

There are, however, two difficulties with this argument. First, as the D.C. Circuit has explained, the statutory definition of "brandish" is "broader than the dictionary definition, as it (Congress' definition) includes uses of a gun invisible to the person threatened so long as the perpetrator somehow makes its presence known." *United States v. Brown*, 449 F.3d 154, 157 (D.C. Cir. 2006). "Having embarked on a definition, the drafter thought it proper to specify the required intent." *Id.* The "brandish" definition is perfectly understandable on its own terms, without drawing the negative inference of an implicit purpose not to require intent for the "discharge" enhancement.

Moreover, the statutory definition of "brandish" requires a particular intent *i.e.*, an intent to "intimidate." 18 U.S.C. § 924(c)(4). If any negative inference were drawn from this language, it would be that Congress did not intend to require specific intent for the "discharge" enhancement. There is no basis for a negative inference that Congress also did not intend to require at least a general intent to dis-

charge the firearm, but instead intended to penalize accidental conduct. Indeed, such an inference would run counter to *Carter*, 530 U.S. at 268-70, which held that a criminal statute must explicitly require specific intent, but will be presumed to require general intent.

Even if the government's interpretation were deemed reasonable, it is not the only reasonable interpretation. As noted, in the context of a series of penalties of escalating severity, it is at least plausible to read the most severe penalty as applying only to intentional conduct. Where "the statute is reasonably susceptible to divergent interpretation," the statute is ambiguous and the Court should "adopt the reading that accords with traditional understandings and basic principles." *Gutierrez de Martinez v. LaMagno*, 515 U.S. 417, 434 (1995). Here a reading that a ten-year sentencing enhancement requires some form of intentional conduct accords with the traditional understanding and basic principle that criminal penalties are linked to intentional conduct, and that escalating penalties are premised on escalating egregiousness of the underlying conduct. In addition, the rule of lenity which, as previously noted, applies to sentencing enhancements requires resolution of any ambiguity in the defendant's favor. *Bifulco*, 447 U.S. at 387.

B. The Legislative History Supports The Conclusion That The Discharge Enhancement Requires Intent

The sentencing enhancements in Section 924(c)(1)(A) were enacted in response to this Court's decision in *Bailey v. United States*, 516 U.S. 137 (1995). Indeed, the amendment adopting these enhancements was described as "the Bailey Fix Act." 144 Cong. Rec. S126670 (daily ed. Oct. 16, 1998)

(statement of Sen. DeWine). When *Bailey* was decided, Section 924(c) imposed a 5-year minimum term on a person who "uses or carries" a firearm during and in relation to a crime of violence or drug trafficking crime. The statute had no sentencing enhancement for brandishing or discharge. *Bailey* construed the term "uses" to require that "the firearm was actively employed during the commission of the crime." *Bailey*, 516 U.S. at 147. The Court explained that "active employment" includes "brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire a firearm." *Id.* at 148.

The Congressional "fix" was twofold. First, it lowered the requirement for the five-year minimum sentence by imposing it on a person who "possesses a firearm" in furtherance of a crime of violence or drug trafficking crime. Second, it separated out three of the elements that the *Bailey* opinion had listed as being examples of "use" *i.e.*, "brandishing," "displaying" and "firing" and made them the occasion for additional sentencing enhancements of 7 and 10 years, respectively.[3] Pub. L. 105-386, § 1, 112 Stat. 3469 (1998), amending 18 U.S.C. § 924(c).

In the previous version of Section 924(c), "brandishing," "displaying," and "firing" as types of "use" were subject to the intent requirement implicit in the statutory requirement that the use be "in relation to" a crime of violence or a drug trafficking crime. *Smith*, 508 U.S. 237-38. Although it expanded the basis for the 5-year enhancement, Congress' decision to single out more serious types of

[3] Congress included "displaying" in its definition of "brandish," thus incorporating it into the 7-year brandishing enhancement. 18 U.S.C. § 924(c)(4).

firearm use (and types of firearms) for enhanced punishment in no way suggested a desire to lower the level of intent previously required to punish these three types of firearm use, or to remove the intent requirement altogether. Instead, having expanded the basis for imposition of the 5-year sentence, Congress simply deemed it appropriate to provide for enhanced sentences for more egregious types of firearm "use." There is no reason to suppose that Congress also sought to remove the intent requirement that previously had applied to this conduct and impose the harshest sentence for an accidental occurrence.

CONCLUSION

For the foregoing reasons, the judgment should be reversed.

Respectfully submitted,

PAMELA HARRIS
NAT'L ASS'N OF CRIMINAL DEFENSE LAWYERS
Co-Chair, Amicus Committee
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

HENRY J. BEMPORAD
Co-Chair, Amicus Committee
NATIONAL ASSOCIATION OF FEDERAL DEFENDERS
OFFICE OF THE FEDERAL PUBLIC DEFENDER
Federal Bldg., Suite B-207
727 East Durango Boulevard
San Antonio, TX 78206
(210) 472-6700

DAVID SALMONS
Counsel of Record
ROBERT V. ZENER
BINGHAM MCCUTCHEN LLP
2020 K Street, NW
Washington, D.C. 20006
(202) 373-6000

MARY PRICE
Vice President and General
Counsel
FAMILIES AGAINST
MANDATORY MINIMUMS
1612 K Street, NW
Suite 700
Washington DC 20006
(202) 822-6700

PETER GOLDBERGER
FAMM LITIGATION ADVISORY
COMMITTEE
50 Rittenhouse Place
Ardmore, PA 19003
(610) 649-8200

Attorneys for Amici Curiae

January 12, 2009